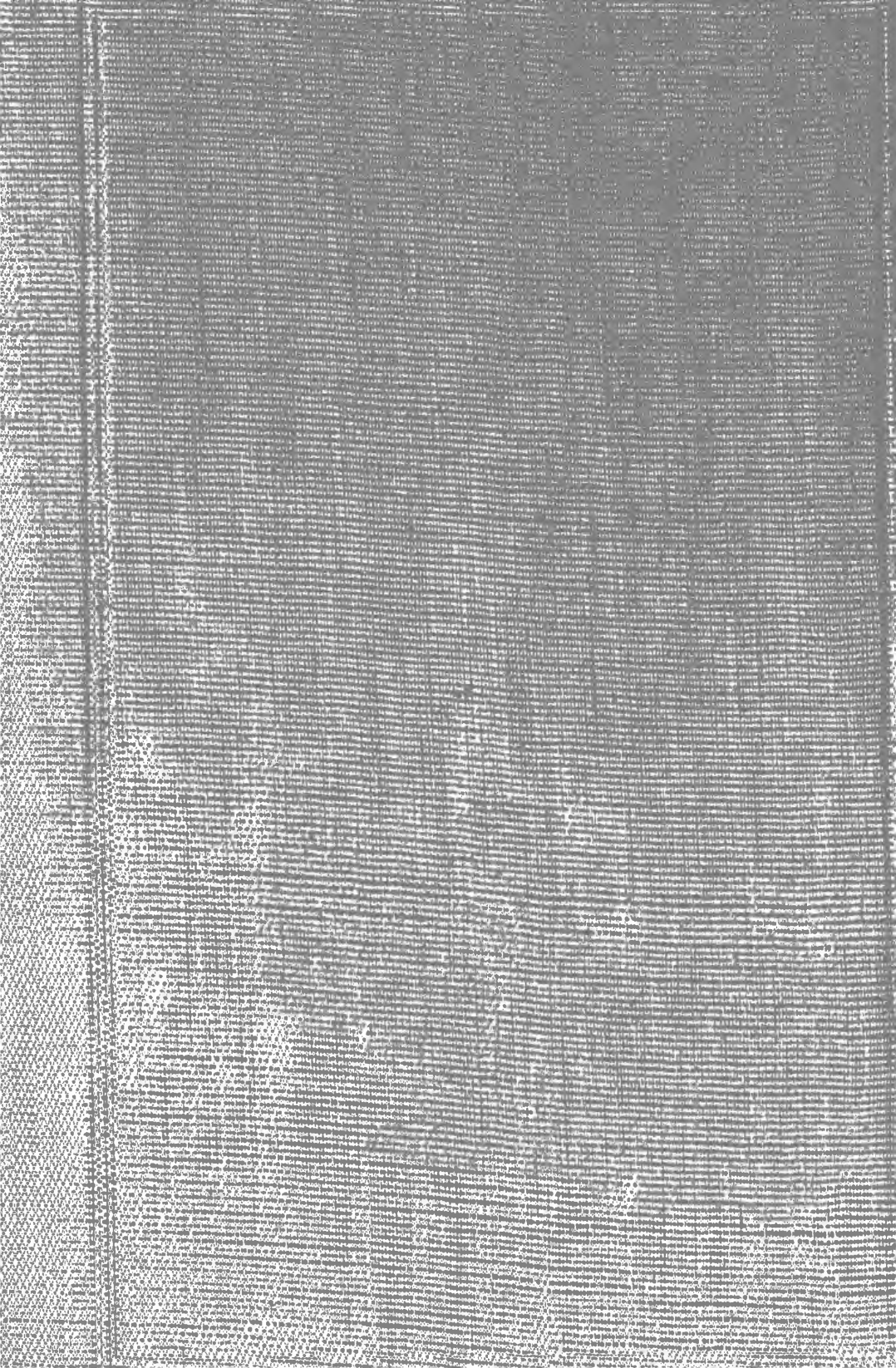

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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

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No. 3964

1338

United States

Circuit Court of Appeals

For the Ninth Circuit.

ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, and R. McCOLGAN,

Appellants,

vs.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased, the Plaintiffs in a Suit Pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of Said Court), and R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY L. TYNAN), EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

ALFRED J. HARWOOD, Esq., Kohl Building, San Francisco, Calif.,

Attorney for Appellants Adelaide McColgan, as Admrx., and R. McColgan.

JOHN L. TAUGHER, Esq., and WM. F. ROSE, Esq., Mills Building, San Francisco, Calif.,

Attorney for Appellee, Frederick V. Lineker, as Admr., etc.

Messrs. MASTICK & PARTRIDGE, Foxcroft Building, San Francisco, Calif.,

Attorneys for Appellees, R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Unions Savings Bank of Modesto and Stanislaus Land and Abstract Company.

Messrs. CULLINAN & HICKEY, Phelan Building, San Francisco, Calif.,

Attorneys for Appellee, Eustace Cullinan.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 506.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Amended Bill of Complaint.

Come now the above-named plaintiffs, and by leave of Court specially granted, bring this, their Amended Bill of Complaint against R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), Daniel A. McColgan, R. McColgan, Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and thereupon the plaintiffs complain and say:

I.

That the plaintiffs, Frederick V. Lineker and

Norvena Lineker, his wife, are citizens, and each of them is a citizen of the Dominion of Canada, and subjects of George IV, King of England, and aliens.

II.

That the defendants, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, are, and each of them is and at all the times herein mentioned has been a corporation organized and existing under the laws of the State of California, and each of them has its principal office and place of business in the City of Modesto, in the Northern District of California, and that all the other defendants above named are citizens of the State of California, and of the United States, and that all of said above-named defendants reside in the Northern District of California.

III.

That the amount of controversy herein, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000). [1*]

IV.

That on or about the 19th day of November, 1907, Norvena Lineker (formerly Norvena Svensen), became the owner of that certain real property situated in the County of Stanislaus, State of California, more particularly described as follows, to wit:

All that portion of the Northwest Quarter of Section Six (6), Township Four (4) South, Range Nine (9) East, Mt. Diablo Base and Meridian, lying North and West of the road in said county known as the Paradise Road.

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That on the 2d day of September, 1914, and at all times since that date, said real property has been of the value of Sixty Thousand Dollars ($60,000.00) and upwards, and said real property is now of the value of Seventy-five Thousand Dollars ($75,000.00) and upwards.

V.

That on or about the 22d day of September, 1912, Norvena Lineker and Frederick V. Lineker, plaintiffs herein, intermarried and ever since that time they have been, and now are husband and wife.

VI.

That on or about the 18th day of August, 1913, the plaintiff, Norvena Lineker, made an instrument in the form of a deed of said property to her husband, Frederick V. Lineker, so that he might be in a better position to assist her in protecting her interest in the above-described real property; that there was no consideration given or received for the making of said instrument; that neither of said plaintiffs have at any time made any transfer of their interest or ownership of said real property, or any part thereof, except as in this Bill of Complaint set forth. [2]

VII.

That on or about the 20th day of June, 1910, and while she was the owner of said real property, the plaintiff Norvena Lineker (then Norvena Svensen), executed and delivered to the defendant, Daniel A. McColgan, a deed of trust, wherein and whereby she conveyed the said real property to R. McColgan, as Trustee, to secure the payment by her of a cer-

tain promissory note dated June 20th, 1910, executed by her to the said defendant, Daniel A. McColgan, for the sum of Twenty-eight Hundred and Fifty Dollars ($2,850.00), and to secure the payment also of other sums that might be loaned by said Daniel A. McColgan to Norvena Lineker (then Norvena Svensen), and evidenced by promissory note or notes of said Norvena Lineker, and also to secure the payment of such other money as might be paid or advanced by the defendant, Daniel McColgan, or R. McColgan, for her use and benefit, and also any liens or encumbrances against said real property which said Daniel A. McColgan or R. McColgan, or both of them, might properly pay or discharge a copy of which said Deed of Trust is hereby annexed, marked Exhibit "A" and made a part hereof.

That the said R. McColgan did not in fact lend to said Norvena Lineker, the full sum of $2,850.00, mentioned in said note dated June 20th, 1910, but only the sum of $2,500.00.

VIII.

That on or about the 2d day of September, 1914, the said real property was sold by R. McColgan, as trustee named in said Deed of Trust, and at said sale the said real property was sold, or attempted to be sold by R. McColgan, as such trustee, to R. S. Marshall, one of the above-named defendants.

IX.

That the defendants, Daniel A. McColgan and R. McColgan, unlawfully and fraudulently claimed that they were entitled under said Deed of Trust

to a sum greatly in excess of the $2,500.00 so advanced by said McColgan, on June 20th, 1910, [3] and the interest thereon and the legal expenses incidental thereto, and said defendants claimed that they were entitled under said deed of trust to the sum of Ten Thousand Dollars ($10,000) and upwards, which claim was false and untrue to the knowledge of the said defendants, Daniel McColgan and R. McColgan, but that the said defendants Daniel A. McColgan and R. McColgan stated to the plaintiff, Frederick V. Lineker, that if he did not procure and turn over to them before the 2d day of September, 1914, the sum of Ten Thousand Dollars ($10,000.00), they would sell out all interest that the plaintiffs, Norvena Lineker and Frederick V. Lineker, had in and to said real property, and cause them to lose all their right, title and interest therein; that in order to prevent a sale of their interest in said property, the plaintiffs procured one Annie V. Connors to advance upon the security of said real property the sum of Thirteen Thousand Dollars ($13,000.00) and relying upon such promise the plaintiff, Frederick V. Lineker, was prepared to purchase said property at the sale under said Deed of Trust to McColgan, and to bid at said sale such amount as might be necessary to protect the property from purchase by anyone else.

X.

That shortly prior to the said sale, the said defendants Daniel A. McColgan and R. McColgan, advised the plaintiff, Frederick V. Lineker, that he ought to bid for said property at said sale at least

the sum of Fourteen Thousand Dollars ($14,000.00), and that it would make little or no real difference in the final settlement of the accounts between the plaintiffs and said Daniel A. McColgan and R. McColgan, how much the plaintiffs bid for said property, for the reason that the plaintiffs would only have to pay to the defendants Daniel A. McColgan and R. McColgan what was justly due under said Deed of Trust dated June 20th, 1910, and that all sums in excess [4] of such amount for which the property might be sold, would be accounted for to the said plaintiffs by said defendants, Daniel A. McColgan and R. McColgan and turned over to the plaintiffs by said defendant, R. McColgan.

That on the day that said property was sold under said Deed of Trust dated June 20th, 1910, to wit, on September 2d, 1914, and before the sale thereof, the attorney representing Annie V. Connors, one J. W. Bingaman, suggested that it might better serve the interest of the plaintiffs and of said Annie V. Connors, if said real property was purchased in the name of some person other than said plaintiffs, or either of them, but as trustees for the said plaintiffs, to which plan the said defendants Daniel A. McColgan and R. McColgan agreed, and they and the attorney for said Annie Connors, urged the plaintiff, Frederick V. Lineker, to permit the sale to be made to one R. S. Marshall, as trustee and agent of said Frederick V. Lineker.

XI.

That the said plaintiffs, being inexperienced in business matters, and particularly in matters relat-

ing to the transfer, sale or encumbering of real property, and relying upon the advice and counsel of the defendants, Daniel A. McColgan and R. McColgan, consented that the property be bought by said R. S. Marshall, as trustee for the said plaintiff, Frederick V. Lineker; that on the 2d day of August, 1914, the said real property was sold by R. McColgan, as Trustee under said Deed of Trust, to the defendant R. S. Marshall, as agent and trustee for the plaintiff, Frederick V. Lineker, for the sum of Fourteen Thousand Dollars ($14,000.00).

XII.

That the defendant, R. S. Marshall, and his wife, Olive H. Marshall, gave their promissory note for Thirteen Thousand Dollars ($13,000.00) to said Annie Connors, and executed a Deed of Trust conveying said land to M. J. Connors and B. M. Lyons, trustees for the said Annie Connors, and received from said [5] Annie Connors the sum of $13,000.00, which amount was thereupon turned over and paid to the said R. McColgan, trustee, under the said Deed of Trust dated June 20th, 1910.

XIII.

That on or about the 3d day of September, 1914, the plaintiff, Frederick V. Lineker, and the defendant R. S. Marshall, entered into a certain agreement in writing, in the words and figures following, to wit:

"THIS MEMORANDUM OF AGREEMENT, made and entered into this 2d day of September, 1914, between R. S. Marshall of the County of Stanislaus, State of California, the party of the

first part, and Fred V. Lineker, of the County of Alameda, State of California, the party of the second part, Witnesseth:

"WHEREAS, R. S. Marshall has this day purchased for said Fred V. Lineker that portion of the Northwest quarter of Section Six (6) Township Four (4) South Range Nine (9) East, Mount Diablo, lying North and West of the County Road known as the Paradise Road, and being situated in the County of Stanislaus, State of California, and in accordance with his understanding and agreement, has given his promissory note secured by deeds of trust upon said premises, one for $13,000.00 to Annie Connors, and one for $2,455.00 to Daniel A. McColgan, and has become personally liable therefor.

"It is agreed by and between the said parties hereto that said party of the first part shall cause the said premises to be surveyed, and subdivided and sell the same, upon the terms and conditions hereinafter specified, and the proceeds thereof shall be divided as hereinafter specified, the said share going to the party of the first part being for and in consideration of the labor and services performed by him, and the responsibility assumed by him. [6]

"It is further understood that of the $2,455.00 loan, $455.00 has been used to pay the first six months' interest of the $13,000.00 loan, and that possibly the said party of the second part may require, for his own use prior to the sale of any of said premises, some money from time to time,

and the party of the first part agrees that in case the said party of the second part desires, he will repay to him the said sum of $455.00, said amount, however, to be paid at the rate of not more than $75.00 per month.

"The party of the first part, as hereinbefore specified, is immediately to cause the said premises to be surveyed and laid out, and upon the sale of said premises, or any portion thereof, the proceeds are to be applied as follows, to wit:

"Toward the payment of the principal and interest of any of the aforesaid indebtedness, and taxes and assessments imposed upon said premises, and any other expenses that by subsequent agreement between the parties may be incurred, and the balance is to be divided equally between the parties hereto.

"It is understood that said land is to be sold at such prices as from time to time may be agreed upon between the parties hereto.

"This agreement is intended to extend to and bind the heirs, executors, administrators and assigns of the parties hereto.

"In case the parties are unable to agree as to the price of sale, said matter shall be submitted to arbitration.

"In Witness whereof, the parties hereto have hereunto subscribed their names the day and year first above written.

"R. S. MARSHALL.
"FRED V. LINEKER."

That on said 2d day of September, 1914, without any real consideration whatever passing from the said R. McColgan [7] or Daniel A. McColgan to the plaintiffs herein or to said R. S. Marshall, the said R. S. Marshall and his wife, Olive H. Marshall, wrongfully and unlawfully, and in fraud of the plaintiffs' rights herein, made or attempted to make a certain Deed of Trust to the defendants R. McColgan and Eustace Cullinan, as trustees for the defendant Daniel A. McColgan, for the sum of Two Thousand Four Hundred and Forty-five Dollars ($2,445.00), or thereabouts.

XIV.

That thereafter and on or about the 22d day of January, 1917, the said R. McColgan and Eustace Cullinan proceeded to sell, or did attempt to sell the said real property under said last mentioned Deed of Trust, and that at such sale the said real property was purchased, or attempted to be purchased, by the defendant, E. C. Peck, and that subsequently the said E. C. Peck sold and conveyed, or attempted to sell and convey the said real property to the defendant, T. K. Beard and that subsequent thereto the said defendant, T. K. Beard and Grace A. Beard sold and conveyed, or attempted to sell and convey a one-half (½) interest in and to said real property to the defendant, R. S. Marshall.

XV.

That the plaintiffs are informed and believe, and upon such information and belief allege: That on or about the 4th day of March, 1918, said T. K. Beard and Grace A. Beard, his wife, and R. S. Mar-

shall and Olive H. Marshall, his wife, made, executed and delivered to the defendant, Union Savings Bank of Modesto, a corporation, a promissory note for the sum of Fifteen Thousand Dollars ($15,000) and as security therefor made, executed and delivered, or attempted to make, execute and deliver to the Stanislaus Land and Abstract Company, their deed of trust conveying said real property hereinabove described, for the benefit of the said Union Savings Bank of Modesto, and the defendants T. K. Beard [8] and R. S. Marshall now claim to be the owners in fee simple absolute of said real property, subject to said Deed of Trust to the Stanislaus Land and Abstract Company, trustees for the said Union Savings Bank.

XVI.

The plaintiffs allege that said pretended Deed of Trust made by the defendant, R. S. Marshall and his wife, Olive H. Marshall, to R. McColgan and Eustace Cullinan, as trustees for the defendant Daniel A. McColgan, was made without any consideration therefor, and for the purpose of obtaining for the defendants Daniel A. McColgan and R. McColgan, an unconscionable and illegal advantage of plaintiffs and of wrongfully obtaining more than was due from the plaintiffs to the defendant, Daniel A. McColgan.

XVII.

That each and all other transfers and attempted transfers of said property and all dealings therewith by any of the defendants subsequent to said 2d day of September, 1914, were made without the

plaintiffs' consent, and were made without any consideration passing to the plaintiffs, or either of them, and are void and illegal.

XVIII.

That prior to the commencement of this action and on or about June 3d, 1918, the plaintiff Frederick V. Lineker revoked and rescinded all right of the said defendant, R. S. Marshall, to act for the said Frederick V. Lineker, as agent or otherwise, under the agreement between them dated September 2d, 1914.

XIX.

That on the 2d day of September, 1914, the said Daniel A. McColgan received from said Annie Connors the sum of Thirteen Thousand Dollars ($13,000), which sum was greatly in excess of all moneys due or owing to him from the plaintiffs, or either of them; and that the Deed of Trust attempted to be made by [9] the defendants, R. S. Marshall and Olive H. Marshall to R. McColgan and Eustace Cullinan, as trustee for Daniel A. McColgan, was without any consideration and void as against these plaintiffs, and that all attempted conveyances and all charges against said land under said Deed of Trust are void, illegal, and made without any consideration moving to these plaintiffs, or either of them, and that any and all conveyances attempted to be made by said R. McColgan and Eustace Cullinan, as trustees for Daniel A. McColgan, under said alleged Deed of Trust dated September 2d, 1914, are void and of no virtue as against these plaintiffs, or either of them, and that the attempted

conveyance hereinbefore mentioned and described by said R. McColgan and Eustace Cullinan to E. C. Peck is void, and of no virtue as against these plaintiffs, or either of them, and that the attempted conveyances of said property by E. C. Peck to the defendant, T. K. Beard, and the subsequent attempted conveyance of said property by T. K. Beard and Grace A. Beard to R. S. Marshall, are and each of them is unlawful and void of any effect as against these plaintiffs, or either of them.

XX.

That said Daniel A. McColgan and said R. McColgan have never paid over to the said plaintiffs, nor to either of them, any part of the said $13,000.00 so advanced by said Annie Connors and received by said defendants Daniel A. McColgan and R. McColgan, and have never accounted to the said plaintiffs, or either of them, for the said money or any part thereof.

WHEREFORE, plaintiffs pray that it be decreed and adjudged by this Honorable Court, that the Deed of Trust made by said R. S. Marshall to R. McColgan and Eustace Cullinan, dated on or about the 2d day of September, 1914, to secure the repayment of the sum of $2,445.00 be declared null and void as against these plaintiffs, and that the attempted transfer of said property [10] by R. McColgan and Eustace Cullinan to E. C. Peck be declared null and void as against these plaintiffs, and that the subsequent attempted transfer of said property from E. C. Peck to T. K. Beard be declared null and void as against these plaintiffs, or

either of them; and that the subsequent transfer of said property by T. K. Beard and Grace A. Beard to said R. S. Marshall be declared null and void as against these plaintiffs, and that the alleged Deed of Trust made by T. K. Beard and Grace A. Beard, his wife, and R. S. Marshall and Olive H. Marshall, his wife, to the Stanislaus Land and Abstract Company, as trustee for the Union Savings Bank of Modesto, be declared null and void as against these plaintiffs.

2d. That the said plaintiffs be declared and adjudged the lawful owners of the property hereinbefore described.

3d. That account be taken of the loan made by Daniel A. McColgan to the plaintiff Norvena Lineker on or about the 20th day of June, 1910, and all moneys paid thereunder, and an account of all sums of money that have been received by the defendants, Daniel A. McColgan, and R. McColgan on account thereof, and from any and all sales of said real property be taken, and that the amount justly owing to the plaintiffs thereunder be ascertained and declared.

4th. That an account be taken of all moneys received by R. S. Marshall, as trustee for said Frederick V. Lineker, and of all moneys that have been properly paid out and expended by him as such Trustee; and that an account of any and all sales of real property made by said R. S. Marshall, if any, within his authority, and of all moneys received therefor be taken, and of all moneys property expended by him.

5th. That any balance found due to the plaintiffs from such accounting be ordered paid to them, and that they have such decree therefor against the defendants, and each of them, as shall be just; [11]

6th. That the defendants be compelled to convey said lands by good and sufficient Deed to the plaintiffs herein, free and clear of any liens or encumbrances thereon, if any such there be, that have been caused or permitted by them, or either of them.

7th. That the plaintiffs have such other and further decree and relief herein as shall be agreeable to equity and good conscience.

8th. That the plaintiffs recover their costs herein.

JOHN L. TAUGHER,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Frederick V. Lineker, being first duly sworn, deposes and says: That he is one of the plaintiffs named in the foregoing amended bill of complaint; that he has read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

FRED V. LINEKER.

Subscribed and sworn to before me this 14th day of January, 1920.

[Seal] OLIVER DURR,

Notary Public in and for the City and County of San Francisco, State of California. [12]

Exhibit "A."

NORVENA E. SVENSEN, a Single Woman,

vs.

R. McCOLGAN, Trustee.

This Deed of Trust, made this twentieth day of June, 1910, between Norvena E. Svensen, a single woman of Modesto, Stanislaus County, California, the party of the first part, and R. McColgan of the City and County of San Francisco, State of California, the party of the second part, and Daniel A. McColgan, also of San Francisco, California, the party of the third part,

WITNESSETH: Whereas the said party of the first part has borrowed and received of the said party of the third part, in Gold Coin of the United States, of the present standard, the sum of Twenty-eight Hundred and Fifty ($2850.00) Dollars, and has agreed to repay the same, with interest to the said party of the third part or his order in like Gold Coin according to the terms of a certain promissory note of even date herewith, executed and delivered therefor by the said party of the first part,

Now This Indenture Witnesseth: That the said party of the first part, in consideration of the afore-

said indebtedness to the said party of the third part, and of One Dollar to her in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of said promissory note, and of any sum or sums of money, with interest thereon, that may be paid or advanced by, or may otherwise be due to the party of the second part, or party of the third part under the provisions of this instrument, and also such additional sums as may be hereafter borrowed and received, by the said party of the first part, from the party of the third part, and evidenced by another promissory note of the said party of the first part, has granted, bargained, sold, conveyed and confirmed, and does hereby grant, bargain, sell, convey and confirm [13] unto the party of the second part and to his successors and assigns the piece or parcel of land situate in the County of Stanislaus, State of California, described as follows:

The fractional Northwest quarter of Section Six (6) in Township Four (4) South, Range Nine (9) east, Mount Diablo Base and Meridian.

Save and except the following described parcel of land, to wit:

Beginning at a 3″x2″ redwood post at the Southeast corner of the Northwest quarter of Section six (6), Township Four (4) south, Range Nine (9) East, Mount Diablo Base and Meridian, running thence South 89° 45′ West, 30.80 chains; thence North 0° 30′ west .45 chains; thence North 50° 0′ East 40.15 chains; thence South 0° 15′ East 26.12

chains to point of beginning. Containing 40.84 acres.

The grantor specially covenants with said second and third parties that she will pay all or any taxes or assessments on the said money loaned or on this Deed of Trust or on any future advances or on the property herein described, or on all the obligations hereby secured.

And also all the estate and interest, homestead or other claim or demand, as well in law as in equity, which the said party of the first part now has or may hereafter acquire of, in and to the said premises, with the appurtenances.

To Have and To Hold the same to the party of the second part and to his successors and assigns, upon the trusts and confidences hereinafter expressed, to wit:

First. During the continuance of these trusts the party of the third part and the party of the second part, their successors and assigns, are hereby authorized to pay, without previous notice, all taxes, assessments and liens, now subsisting or which may hereafter be imposed by National, State, County, City or [14] other authority, or which may appear, *prima facie,* to subsist or be imposed upon said premises to whomsoever assessed, and all or any encumbrances now subsisting, or that may hereafter subsist thereon which may, in their judgment, affect said premises, or these trusts, at such time as in their judgment they may deem best, or in their discretion for the benefit and at the expense of said party of the first part, to con-

test the payment of any such taxes, assessments, liens or encumbrances, or defend any suit or proceeding instituted for the enforcement thereof; and in like manner to prosecute or defend any suit or proceeding that they may consider proper to protect the title to said premises; and to keep the buildings now erected or which may hereafter be erected on said premises insured against loss by fire in the sum of Twenty-eight Hundred and Fifty ($2850.00) Dollars (or less in their discretion), with such Company or companies as they may deem proper, loss, if any, payable to the party of the third part; and these trusts shall be and continue as security to the party of the third part and of the second part, and their successors and assigns for the repayment in Gold Coin of the United States of the moneys so borrowed by said party of the first part and the interest thereon, and of all amounts so paid out, and costs and expenses incurred as aforesaid, whether paid by the party of the second part or party of the third part, with interest on such payments at the rate of one per cent per month until final repayment, which disbursement and interest the party of the first part hereby agrees to pay.

Secondly. In case the said party of the first part shall well and truly pay or cause to be paid at maturity in Gold Coin as aforesaid, all sums of money so borrowed as aforesaid, and the interest thereon, and shall upon demand repay all other moneys secured or intended to be secured hereby, and also the reasonable expenses of this trust, then the

party of the second part, [15] the, his successors and assigns, shall reconvey all the estate in the premises aforesaid to her by this instrument granted, unto the said party of the first part and assigns, at her request and cost.

Thirdly: If default shall be made in the payment of any of said sums or principal or interest, when due, in the manner stipulated in said promissory note, in *in* the reimbursement of any amounts herein provided to be paid or of any interest thereon, then the said party of the second part, his successors or assigns, on demand by the party of the third part, or his assigns, shall sell the above granted premises or such part thereof, as in his discretion he shall find it necessary to sell, in order to accomplish the objects of this trust in the manner following, namely:

The trustee shall first publish the time and place of such sale, with a description of the property to be sold, at least once a week for four successive weeks, in some newspaper published in the County Seat of the County wherein said property or a portion thereof is situated, and may from time to time postpone such sale by publication; and on the day of sale so advertised, or to which such sale may be postponed, may sell the property so advertised or any portion thereof, at public auction at the time and place specified in the published notice to the highest cash bidder, and the holder or holders of said promissory note his agent or assigns, may bid and purchase at such sale.

The trustee may sell said premises, as above described, as a whole, or in his discretion, in such reasonable parcels or subdivisions as he in his judgment may deem advisable.

And the party of the second part or his successors or assigns, shall establish as one of the conditions of such sale that all bids and payments for said property shall be made in like gold coin as aforesaid, and upon such sale he shall make, execute and, after [16] due payment made, shall deliver to the purchaser or purchasers his or their heirs and assigns, a deed or deeds of the premises so sold, and out of the proceeds thereof shall pay:

First: The expenses of such sale, together with the reasonable expenses of this trust, including counsel fees of One Hundred ($100.00) dollars, in Gold Coin, which shall become due upon any default made by the said party of the first part, in any of the payments aforesaid.

Second: All sums which may have been paid, under or in accordance with the provisions hereof, by the said party of the third part, or the party of the second part, his successors or assigns or the holder or holders of the note aforesaid, and not reimburse, which may then be due, whether paid on account of encumbrances or insurance as aforesaid, or in the performance of any of the trusts herein created; together with any additional sums borrowed as aforesaid, and with whatever interest may have accrued thereon; next, the amount due and unpaid on said promissory note, with whatever interest may have accrued thereon; and lastly, the

balance or surplus of such proceeds, if any, to said party of the first part, or —— assigns.

And in the event of a sale of said premises, or any part thereof, and the execution of a deed or deeds therefor, under these trusts then the recitals therein of default and publication of notice of sale, and a demand by the party of the third part, his successors or assigns, that such sale should be made, shall be conclusive proof of such default and of the due publication of such notice, and that the sale was made on due and proper demand, by the party of the third part, his successors or assigns; and any such deed or deeds, with such recitals therein shall be effectual and conclusive against the said party of the first part, her heirs or assigns, and all other persons as to such default, publication and demand; and the receipt for the purchase money contained in any [17] deed executed to a purchaser as aforesaid, shall be a sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money, according to the trusts aforesaid.

It is expressly covenanted that the party of the third part may, from time to time, appoint other Trustee or Trustees to execute the trusts hereby created; and upon such appointment, and a conveyance to her by the party of the second part, or his successors or assigns, the new Trustee shall be vested with all the title, interest, powers, duties and trusts in the premises, hereby vested or conferred upon the party of the second part. Such new Trustee shall be considered the successors

and assigns of the party of the second part within the meaning hereof.

If a corporation, a copy of such Resolution, certified by the Secretary of the party of the third part, under its corporate seal and attached to the instrument of assignment or transfer shall be conclusive proof of the proper appointment of such substituted Trustee or Trustees.

IN WITNESS WHEREOF, the said party of the first part has hereunto set her hand and seal the day and year first above written.

NORVENA E. SVENSEN. (Seal)

Signed, sealed and delivered in the presence of
WILLIAM WINTER.

State of California,
City and County of San Francisco,—ss.

On this 20th day of June, in the year one thousand nine hundred and ten, before me, Matthew Brady, a Notary Public, in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Norvena E. Svensen, a single woman, [18] known to me to be the person described in and who executed, and whose name is subscribed to the within and foregoing instrument and she acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MATTHEW BRADY,
Notary Public, in and for said City and County of San Francisco, State of California.

Recorded at the request of D. McColgan April 22, 19—at 42 min. past 11 o'clock A. M. in Vol. 146 of Deeds, page 378, Records of Stanislaus County.

H. C. KEELEY,
Recorder.

Receipt of a copy of the within amended bill of complaint admitted this 15th day of January 1920.

HAWKINS & HAWKINS,
MASTICK & PARTRIDGE,
Attorneys for Defendants, Marshalls, Peck & Beard and Mary J. Dillon.

CULLINAN & HICKEY,
Attys. for Defendants, McColgans & Eustace Cullinan.

[Endorsed]: Filed Jan. 15, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), DANIEL A. McCOLGAN, R.

McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK of MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Answer of Defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan.

Defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan, answering the amended bill of complaint on file herein, admit, deny and allege as follows, to wit:

I.

Said defendants have no information or belief upon the subject of paragraph I of said amended complaint sufficient to enable them to answer the allegations thereof and placing their denial on that ground said defendants deny that the plaintiffs are, or that either of them is, a citizen of the Dominion of Canada, or a subject of King George IV or King George V of England, and deny that said plaintiffs are, or that either of them is, an alien.

II.

Said defendants have no information or belief upon the subject of paragraph VI of said amended bill of complaint sufficient to enable them to answer the allegations thereof and placing their denial on that ground said defendants deny that on or about the 18th day of August, 1913, the plaintiff Norvena Lineker made an instrument in the form of a deed of said property to her husband, Frederick V.

Lineker, and deny [20] that on or about the 18th day of August, 1913, or at any time, Norvena Lineker made such a deed to said Frederick V. Lineker so that he might be in a better position to assist her in protecting her interests in the real property described in said amended bill of complaint; deny that there was no consideration given or received for the making of said instrument, and deny that neither of said plaintiffs have at any time made any transfer of their ownership of said real property, or any part thereof, except as in said amended bill of complaint set forth, and in this respect said defendants allege that such a deed, bearing date August 18, 1913, was recorded in the office of the County Recorder of the County of Stanislaus, State of California on July 27, 1914, and not before.

III.

Answering the allegations in paragraph VII of said amended bill of complaint, said defendants deny that by the said deed of trust dated the 20th day of June, 1910, the said Norvena Lineker conveyed said real property to R. McColgan as trustee to secure the payment of such other money as might be paid or advanced by the defendant, Daniel A. McColgan or R. McColgan, for her, said Norvena E. Lineker's use and benefit, and also any liens or encumbrances against said real property which said Daniel A. McColgan or R. McColgan, or both of them, might properly pay or discharge, and in this behalf said defendants admit that the copy of the deed of trust annexed to plaintiff's

complaint is a correct copy thereof, and in this behalf said defendants allege that said deed of trust was so executed as security for the payment of said sum of $2850.00 and for the purpose of securing the payment of any sum or sums of money, with interest thereon, that may be paid or advanced by, [21] or may otherwise be due to the party of the second part in said deed of trust named, to wit, said R. McColgan, trustee, or the party of the third part in said deed of trust named, to wit, said Daniel A. McColgan, under the provisions of said deed of trust (which is hereinafter called the first deed of trust), and also such additional sums as may be thereafter borrowed and received by the said Norvena E. Lineker from the said Daniel A. McColgan and evidenced by another promissory note of said Norvena E. Lineker; and said deed of trust further provided that the said R. McColgan, as trustee, and the said Daniel A. McColgan, as party of the third part therein, were authorized to pay, without previous notice, all taxes, assessments and liens, then subsisting or which might thereafter be imposed by national, state, county, city or other authority or which may appear, *prima facie,* to subsist or be imposed upon said premises to whomsoever assessed and all or any encumbrance then subsisting or that might thereafter subsist thereon which may in the judgment of said R. McColgan, as trustee, or of said Daniel A. McColgan, affect said premises, or the trusts in said deed of trust mentioned, at such time as in their judgment they might deem best; and said

deed of trust further provided that it should be security to the said Daniel A McColgan and the said R. McColgan as trustee and their successors and assigns for the repayment of all amounts so paid out and costs and expenses incurred as in said deed of trust set forth, with interest thereon at the rate of one per cent (1%) per month until final repayment, which disbursements and interest the said Norvena E. Lineker by said deed of trust agreed to pay.

IV.

Said defendants deny that said R. McColgan did not in fact lend to Norvena E. Lineker the full sum of $2850.00 but [22] allege that said Daniel A. McColgan did in fact lend to said Norvena E. Lineker the full sum of $2850.00 mentioned in said note dated June 20, 1910, but in this behalf said defendants allege that said Norvena E. Lineker, out of said sum of $2850.00, paid to said R. McColgan, the sum of $350.00 as a commission for making said loan, and that said R. McColgan and said Daniel A. McColgan are, and at all times mentioned in said amended bill of complaint were, mortgage loan brokers engaged in the business of lending money of their own, and of other persons.

V.

Said defendants admit that on or about the 2d day of September, 1914, the said real property was sold by R. McColgan as trustee named in said first deed of trust, to wit, said deed of trust dated June 20, 1910, and admit that the said real property was sold by said R. McColgan, as such trustee, to

R. S. Marshall, one of the above-named defendants, and in this respect the said defendants allege that said real property was so sold at said time with the knowledge of said plaintiffs herein and that said R. S. Marshall who bought the said property, at said sale, and who is one of the defendants herein, attended said sale and purchased said property in pursuance of an agreement between said Frederick V. Lineker and Norvena E. Lineker, plaintiffs herein, and said R. S. Marshall, wherein and whereby it was understood and agreed that said defendant, R. S. Marshall, should attend said sale and purchase thereat for said Frederick V. Lineker, and Norvena E. Lineker or for himself and Frederick V. Lineker, and Norvena E. Lineker, the said real property in said amended bill of complaint described; that said R. S. Marshall in purchasing said real property at said sale on the said 2d day of September, 1914, acted as the agent and trustee of said Frederick V. Lineker and of said Norvena E. Lineker and with [23] their knowledge and consent and at their request, and that he bought said real property at said sale on said 2d day of September, 1914, for the use and benefit of said Frederick V. Lineker and said Norvena E. Lineker and that in said transaction said R. S. Marshall was a mere convenience, agent and representative of said Frederick V. Lineker and Norvena E. Lineker; and said defendants are informed and believe and on such information and belief allege that said R. S. Marshall and Frederick V. Lineker, at the time when said land was so

purchased by R. S. Marshall had some contract between themselves respecting the ownership or subdivision or sale of said land.

VI.

Said defendants admit that Daniel A. McColgan and R. McColgan claimed that they were entitled, under said deed of trust to a sum greatly in excess of $2500.00 and the $2850.00 so advanced by said McColgan on June 20, 1910, and the interest thereon and the legal expenses incident thereto, but deny that said Daniel A. McColgan and R. McColgan claimed that they were entitled, under said deed of trust, to the sum of $10,000.00, and upwards, and said defendants deny that said Daniel A. McColgan or R. McColgan or either of them unlawfully or fraudulently so claimed and deny that any claim of indebtedness made by said Daniel A. McColgan or R. McColgan in or about said transaction was false or untrue to the knowledge of said defendants Daniel A. McColgan and R. McColgan, or either of them; and in this behalf said defendants allege that on the 2d day of September, 1914, and prior to said sale said Daniel A. McColgan informed said Frederick V. Lineker that his total outlay in and about said deed of trust and transactions relating to said land was $10,116.00 and that he, said Daniel A. McColgan, intended to bid the sum of $10,116.00 for said land at said sale then about to be held; deny that said defendants Daniel A. McColgan and R. [24] McColgan, or either of them, stated to the plaintiff Frederick V. Lineker that if he did not procure and turn over to them before the 2d day

of September, 1914, the sum of $10,000.00 they would sell out all interest that the plaintiffs Norvena E. Lineker and Frederick V. Lineker had in or to said real property and cause them to lose all their right, title and interest therein, but in this behalf said defendants allege that they notified said Frederick V. Lineker and Norvena E. Lineker that they were about to sell said real property under the terms of said deed of trust unless, before such sale they received the amount which was due, owing and unpaid to said Daniel A. McColgan from said Frederick V. Lineker and Norvena E. Lineker, or either of them, and secured by said deed of trust.

Said defendants admit that the said plaintiffs procured one Annie E. Connors to advance, upon the security of said real property, the sum of $13,000.00 but deny that they did so to prevent a sale of their interests in said real property and deny that relying upon any promise of said Annie E. Connors, or any other person, plaintiff, Frederick V. Lineker, was prepared on said 2d day of September, 1914, or at any time prior thereto to purchase said property at the sale under said deed of trust to McColgan, to wit, said first deed of trust, or to bid at said sale such amount as might be necessary to protect the property from purchase by anyone else; and in this behalf the said defendants allege that on the 2d day of September, 1914, at the time of said sale, under said first deed of trust, the interest of said Norvena E. Lineker and of said Frederick V. Lineker, in said property was subject to certain attachments legally levied upon the

interest of said Frederick V. Lineker and Norvena E. Lineker in said land amounting in the aggregate to the principal sum of $2380.74 together with interest; said defendants allege that said attachments were subordinate to said first deed of trust; [25] that said Frederick V. Lineker and Norvena E. Lineker, while they had available or could borrow from said Annie E. Connors a sum sufficient to pay all moneys owing to or claimed by said Daniel A. McColgan and secured by said deed of trust as aforesaid, were afraid and unwilling to pay said Daniel A. McColgan the said sum, which said Daniel A. McColgan claimed to be due and owing and which was in fact due and owing to him and secured by said deed of trust as aforesaid, or other sums which he had expended in connection with said land, and which were not secured by said deed of trust, because, upon the satisfaction of the debt secured by said deed of trust and the reconveyance of said real property by said R. McColgan, as trustee named in said deed of trust to said Norvena E. Lineker and said Frederick V. Lineker, the interests of said Norvena E. Lineker and Frederick V. Lineker, or either of them would still be subject to said attachments for the aggregate principal sum of $2380.74 and interest thereon; that said Frederick V. Lineker and said Norvena E. Lineker for that reason refused to satisfy the debt to said Daniel A. McColgan, secured by said deed of trust, and thus compelled said R. McColgan, as trustee, to sell said real property under the terms of said first deed of trust, and that said Frederick V. Lineker and

Norvena E. Lineker procured and induced said R. S. Marshall to so purchase said real property at said trustee's sale on September 2d, 1914, to hold the said real property, so purchased by said R. S. Marshall, in trust for said Frederick V. Lineker or said Norvena E. Lineker, or both of them, in order that the legal title to said land might not revest in said Frederick V. Lineker or Norvena E. Lineker, and again become subject to the liens of said attachments aggregating $2380.74 and interest; that said real property was so purchased at said sale on the 2d day of September, 1914, by said R. S. Marshall and so held by him in trust for said Frederick V. Lineker and Norvena E. Lineker upon some agreement [26] or contract between said R. S. Marshall and Frederick V. Lineker to which neither said Daniel A. McColgan nor R. McColgan was a party, in order that said Frederick V. Lineker and Norvena E. Lineker might avoid the payment of the debts or obligations for which the said real property had been so attached for the aggregate principal sum of $2380.74; that the sale under said deed of trust which actually occurred on the 2d day of September, 1914, was first set and notice thereof published, to be held on the 24th day of May, 1914; that on said 24th day of May, 1914, at the time and place first set for such sale, representatives of some of said attaching creditors appeared and were apparently prepared to bid for the said real property; that said Frederick V. Lineker and Norvena E. Lineker were afraid that if said land were so sold under said deed of trust on the said

2d day of September, 1914, some of said attaching creditors would bid and would buy it for an amount equal to the sum so due said Daniel A. McColgan and secured by said deed of trust plus the amounts of said attachments and would thus not only get said land for less than its value but would leave in the hands of the trustee, said R. McColgan, a surplus, after the satisfaction of the indebtedness so due to said Daniel A. McColgan and secured by said deed of trust, which would probably be impressed and which they thought would be impressed under the law with the liens of said attachments:

On May 24, 1914, the date first set for said sale, said Frederick V. Lineker and Norvena E. Lineker did not have sufficient money to protect their title to said land against the bids of competing bidders at said sale under said deed of trust and the said sale under said deed of trust was on said 24th day of May, 1914, at the request of said Frederick V. Lineker continued to June 1, 1914, and was continued then successively at the request of said Frederick V. Lineker, to June 15, 1914, to June 30, 1914, to July 23, 1914, to August 6, 1914 and to September 2, 1914 and [27] at none of said times prior to September 2, 1914, was said Frederick V. Lineker or said Norvena E. Lineker prepared or able to bid at a sale, if held on such date under said deed of trust, a sum equal to the amount due, owing and unpaid to said Daniel A. McColgan and secured by said deed of trust, or a sum sufficient to secure the title to said land from being sold to strangers bidding at such sale.

VII.

Said defendants deny that said Daniel A. McColgan and R. McColgan, or either of them, on September 2, 1914, prior to said sale, or at any other time, advised the plaintiff Frederick V. Lineker that he ought to bid for said property at said sale at least the sum of $14,000.00 and in this behalf said defendants are informed and believe and upon such information and belief allege that said plaintiff was so advised to bid at least the sum of $14,000.00 for said land at said sale by L. V. Dennett, Esq., who was then and there his attorney at law in and about said transactions, and said defendants are informed and believe and upon such information and belief allege that said Dennett advised the said plaintiffs that it would be necessary for them, or for said R. S. Marshall, as their representative, agent and trustee, to bid for said property a sum of not less than $14,000.00 in order to prevent said attaching creditors or other competing bidders from acquiring the title to said land at said sale under said deed of trust.

VIII.

Said defendants deny that said Daniel A. McColgan and R. McColgan, or either of them, advised the plaintiff, Frederick V. Lineker, that it would make little or no difference in the final settlement of the accounts between the plaintiffs and Daniel A. McColgan and R. McColgan how much the plaintiffs bid on said property for the reason that the plaintiffs would only have to [28] pay to the defendants, Daniel A. McColgan and R. McColgan,

what was justly due under said deed of trust dated June 20, 1910, and that all sums in excess of such amount for which the property might be sold would be accounted for by the said defendants to the said plaintiffs, or turned over to plaintiffs by said R. McColgan, and in this behalf the said defendants allege that there was no agreement or understanding or conversation between said Frederick V. Lineker, or any person representing him, and said Daniel A. McColgan or R. McColgan respecting the disposition of any surplus that might remain in the hands of said R. McColgan, as such trustee, out of the sale price of said land after the payment and satisfaction of the debt due to said Daniel A. McColgan and secured by said deed of trust.

IX.

Said defendants have no information or belief upon the subject sufficient to enable them to answer the allegations that on September 2, 1914, and before the sale of said real property, the attorney representing Annie E. Connors, one J. W. Binganman, suggested that it might better serve the interests of the plaintiffs and of said Annie E. Connors if said real property was purchased in the name of some person other than the name of said plaintiffs or either of them, but as trustee for said plaintiffs, and placing their denial upon such lack of information and belief, said defendants deny such allegation, and defendants deny that said Daniel A. McColgan and R. McColgan, or either of them agreed or were parties to said plan, but admit and allege that they were aware at the time

of such sale of a plan which they are informed and believe and upon such information and belief allege to have been suggested by L. V. Dennett, attorney for said plaintiffs, to have said R. S. Marshall purchase said land as trustee and agent for said Frederick V. Lineker and Norvena E. Lineker, but said defendants had no information at that time concerning the [29] conditions of any contract or agreement between said R. S. Marshall and said Frederick V. Lineker.

X.

Said defendants have no information or belief upon the subject sufficient to enable them to answer the allegations that the plaintiffs are inexperienced in business matters or particularly in matters relating to the transfer, sale or encumbering of real property and placing their denial on that ground said defendants deny the allegations to that effect in said amended bill of complaint, and said defendants admit that the said plaintiffs consented that the said real property be bought by said R. S. Marshall, as trustee for the said plaintiff Frederick V. Lineker, but deny that they gave such consent relying upon the advise or counsel of defendants Daniel A. McColgan and R. McColgan, or either of them, and in this behalf said defendants allege that in and about said sale and all transactions leading up thereto the said plaintiffs acted upon the advice of their said attorney, L. V. Dennett, Esq., and not in any measure or respect upon the advice of said Daniel A. McColgan or R. McColgan, and said defendants admit that on the 2d day of September,

1914, the said real property was sold by R. McColgan, as trustee under said deed of trust, to defendant R. S. Marshall, as agent and trustee for the plaintiff Frederick V. Lineker for the sum of $14,000.00; but said defendants allege that said R. S. Marshall was unknown to said defendants Daniel A. McColgan and R. McColgan, prior to the day of said sale, and that said Daniel A. McColgan and R. McColgan did not suggest or find said R. S. Marshall as a purchaser at such sale, and that defendant Eustace Cullinan had no connection with said sale or any of said transactions on or prior to said September 2d, 1914. [30]

XI.

Said defendants admit and allege that on the 2d day of September, 1914, said R. S. Marshall and his wife, Olive H. Marshall, made and attempted to make a certain deed of trust to the defendants, R. McColgan and Eustace Cullinan, as trustee for the defendant Daniel A. McColgan, for the sum of $2455.00, but defendants deny that said deed of trust was without any consideration passing from said R. McColgan or Daniel A. McColgan to the plaintiffs herein or to said R. S. Marshall, and in this behalf said defendants allege that the said R. S. Marshall and Frederick V. Lineker and Norvena Lineker received a valuable consideration, to wit, the sum of $2455.00 for said deed of trust, which sum of $2455.00 was loaned to and received by said R. S. Marshall, as the agent and trustee for said Frederick V. Lineker and Norvena E. Lineker, by said Daniel A. McColgan and said deed of trust

dated September 2, 1914, was so executed by said R. S. Marshall as the agent for and representative of said Frederick V. Lineker and Norvena E. Lineker, as security for the repayment of said sum of $2455.00 to said Daniel A. McColgan, and in this behalf said defendants further allege that said deed of trust, dated September 2, 1914, was so executed by said R. S. Marshall and Olive H. Marshall, his wife, with the full knowledge and consent and at the request and on behalf of said Frederick V. Lineker and Norvena E. Lineker his wife, and was not so executed wrongfully or fraudulently or in fraud of any rights of plaintiffs or either of them, or for the purpose of obtaining for the defendants Daniel A. McColgan and R. McColgan, or either of them any unconscionable or illegal or other advantage of plaintiffs or of wrongfully or otherwise obtaining more than was due from the plaintiffs or either of them to the defendant, Daniel A. McColgan.

XII.

Said defendants deny that any of the transfers of said property or any dealings therewith by any of the defendants subsequent to said 2d day of September, 1914, were made without any [31] consideration passing to the plaintiffs or either of them or were void or illegal.

XIII.

Said defendants deny that said Daniel A. McColgan received from said Annie Connors but admit and allege that he received from said R. S. Marshall, as agent and trustee for said Frederick V. Lineker

and Norvena E. Lineker on September 2, 1914, the sum of $13,000.00 and allege that he so received the sum of $14,000.00 (including said $13,000.00) on said 2d day of September, 1914, and admit that said sum of $14,000.00 was in excess of all moneys due or owing to Daniel A. McColgan from the plaintiffs or either of them on said date, but in this behalf said defendants allege that at the time of said sale of said real property on said 2d day of September, 1914, neither said Frederick V. Lineker nor said Norvena E. Lineker was the owner of said real property, or was entitled to any surplus of said sum of $14,000.00 remaining in the hands of said R. McColgan, as such trustee, after the satisfaction of the debt owing from said Norvena E. Lineker to Daniel A. McColgan the payment of which was secured by said deed of trust as aforesaid, and said defendants deny that the deed of trust so made on September 2d, 1914, by R. S. Marshall and Olive H. Marshall to R. McColgan and Eustace Cullinan, as trustees for Daniel A. McColgan, was without any consideration or void, and deny that all or any attempted conveyances or charges against said land under said deed of trust are void or illegal or made without consideration, and deny that any conveyance made by said R. McColgan and Eustace Cullinan, as trustees under said deed of trust, dated September 2d, 1914, is void or of no virtue as against said plaintiffs or either of them, and deny that the said conveyance by R. McColgan and Eustace Cullinan, as trustees, to E. C. Peck is void, or of no virtue as against said plaintiffs or either of them. [32]

XIV.

FIRST SPECIAL DEFENSE—PURCHASE OF THE TITLE.

And as a further and separate answer and defense said defendants allege the following facts:

Norvena E. Svensen on June 20, 1910, executed to defendant, R. McColgan, as trustee for defendant, Daniel A. McColgan, a deed of trust conveying the land in Stanislaus County, State of California, described in plaintiffs' amended bill of complaint, as security for the payment of certain loans made or thereafter to be made to Norvena E. Svensen by Daniel A. McColgan. A copy of said deed of trust is attached as an exhibit to plaintiffs' amended bill of complaint.

On September 22, 1912, plaintiff, Frederick V. Lineker, married Norvena E. Svensen, and on July 27, 1914, said Frederick V. Lineker recorded in the office of the County Recorder in the County of Stanislaus, State of California, a deed, dated August 18, 1915, by which said Norvena E. Lineker conveyed and granted said land to said Frederick V. Lineker. The said deed of trust, hereinafter called the first deed of trust, and the promissory notes which it secured, were signed by Norvena E. Svensen. Frederick V. Lineker was not a party to the notes nor to the deeds of trust. While said Frederick V. Lineker took said land by virtue of said deed from Norvena E. Lineker, subject to said first deed of trust, there was no relation of debtor or creditor or any other contractual relation between Frederick V. Lineker and Daniel A. McColgan.

On the 11th day of June, 1913, in an action then pending in the Superior Court of the State of California, in and for the County of Alameda, one J. A. Williams, plaintiff therein, recovered a judgment against said Norvena E. Svensen (who became Norvena E. S. Lineker when she married said plaintiff) which judgment was for the sum of $1285.00, together with $15.00 costs. In said [33] action a writ of execution was issued to the Sheriff of the County Stanislaus on the 29th day of July, 1913, directing said Sheriff to satisfy said judgment out of the property of Norvena E. Svensen. Thereafter and in pursuance of said writ of execution, A. S. Dingley, as the Sheriff of said County of Stanislaus, did, on the 7th day of August, 1913, levy upon said real property, being the same land described herein and in said first deed of trust, and after giving notice as required by law, said Sheriff of the County of Stanislaus sold said real property at public auction, in accordance with said writ of execution, and at said sale, which was held on the 30th day of August, 1913, the said Sheriff of said County of Stanislaus sold said real property to one William C. Crittendon, who was the highest bidder thereat, for the sum of $1361.20, and said Sheriff of said County of Stanislaus, on said 30th day of August, 1913, issued to said William C. Crittenden his certificate of said sale in accordance with law, and a duplicate of said certificate was duly filed by said Sheriff of said County of Stanislaus in the office of the County Recorder of the County of Stanislaus, and there recorded

on the 3d day of September, 1913, in Volume 3 of Certificates of Sale, at page 81 thereof. Thereafter and on the 15th day of July, 1914, Daniel A. McColgan purchased and acquired from said William C. Crittendon, with Daniel A. McColgan's own money, all the right, title and interest of said William C. Crittendon in and to said real property and in and to said certificate of sale, and said William C. Crittendon on the 15th day of July, 1914, executed to said Daniel A. McColgan an instrument in writing whereby said William C. Crittendon granted, sold and assigned to said Daniel A. McColgan the said certificate of sale and all the right, title and interest of said William C. Crittendon in and to said certificate of sale in and to said real property therein described. Said instrument in writing so executed by William C. Crittendon to said Daniel A. McColgan, was recorded in the office of the County Recorder of said County of [34] Stanislaus on the 2d day of September, 1914, and prior to the sale under said first deed of trust, in Volume 3 of Miscellaneous Records, at page 343 thereof. Thereafter and on said 2d day of September, 1914, and prior to said sale under said first deed of trust, the said Sheriff of the County of Stanislaus, executed to said Daniel A. McColgan, in accordance with the law, his deed reciting the facts of the issuance of the said writ of execution, the sale thereunder, the issuance of his certificate of sale to William C. Crittendon as aforesaid, the assignment by said William C. Crittendon to Daniel A. McColgan, as aforesaid, and granting, in ac-

cordance with law, and in pursuance of the statute in such cases, made and provided to said Daniel A. McColgan all the right, title and interest and claim which the said judgment debtor, Norvena E. Svensen, had at the time of the levying of said writ of execution, as aforesaid, or on the 2d day of September, 1914, in and to said land, and said deed from said Sheriff to said Daniel A. McColgan was recorded in the office of the said County Recorder of the said County of Stanislaus, on the 2d day of September, 1914, in Volume 217 of Deeds at page 143 thereof. Said D. A. McColgan so purchased and acquired from said William C. Crittendon all the right, title and interest of William C. Crittendon in and to said real property and in and to said certificate of sale, for his own use and benefit and with his own money. Said Daniel A. McColgan did not purchase or acquire the said right, title and interest of said William C. Crittendon, in and to said real property or in and to said certificate of sale for the use or benefit of said Frederick V. Lineker or Norvena E. Lineker, or of any person except himself.

In April, 1914, nearly four years after the execution of said first deed of trust and when the earliest note secured thereby was about to outlaw, said Daniel A. McColgan directed said R. McColgan, the trustee in said first deed of trust, to publish and said trustee did publish a notice of sale and proceed to sell said [35] land under the terms of said deed of trust. At that time no part of the principal, secured by said deed of trust, had

been paid and there was a large accumulation of long over-due interest. The sale under said first deed of trust was first set for May 24, 1914.

At that time the said land was subject not only to said first deed of trust, which was the earliest encumbrance, and to said William C. Crittendon's said certificate of purchase, but was subject to certain liens, all subordinate to said first deed of trust, for the aggregate principal sum of $2,380.74, and there was a considerable amount of interest secured by said liens in addition to said principal sum of $2,380.74.

Said Frederick V. Lineker and Norvena E. Lineker and their attorney in and about said transactions, L. V. Dennett, Esq., was afraid, on and prior to said 24th day of May, 1914, that if said land was so sold under the terms of said first deed of trust, one or some of the holders of said liens subsequent to said first deed of trust, would bid for said land at said trustee's sale an amount in excess of the debt then due to said Daniel A. McColgan and secured by said first deed of trust, equal to the amount of said subsequent liens, and that as said Frederick V. Lineker and Norvena E. Lineker had not and could not procure sufficient money to purchase said land at said trustee's sale on May 24, 1914, one or some of the holders of said subsequent liens would thus acquire title to said land for less than its value, and that there would remain in the hands of said R. McColgan, as said trustee, a surplus of money, which after the satisfaction of the indebtedness due and owing to

said Daniel A. McColgan, and secured by said first deed of trust, would be impressed by law with said liens for the amount of $2,380.79 and interest. At the request of said L. V. Dennett, and in order to give said Frederick V. Lineker and Norvena E. Lineker, additional time to procure money for the payment of the indebtedness so due to Daniel A. McColgan, and secured by said [36] first deed of trust, and in order to prevent any of the holders of said subsequent liens from thus, at said trustee's sale, obtaining title to said land, to the detriment of said Frederick V. Lineker and Norvena E. Lineker, the said R. McColgan, as such trustee, postponed the said sale under said deed of trust, from May 24th, 1914, successively to June 1st, 1914, and then to June 15th, 1914, and then to June 30th, 1914, and then to July 23d, 1914, and then to August 6th, 1914, and finally to September 2d, 1914. On none of said dates, prior to September 2d, 1914, did said Frederick V. Lineker or Norvena E. Lineker have, or could they procure, sufficient money to protect the title to said land, as aforesaid, and to outbid such holders of said subsequent liens and to prevent said land from being sold to strangers, nor did said Frederick V. Lineker or Norvena E. Lineker on any of said dates prior to September 2, 1914, have, nor could they, or either of them, procure sufficient money to bid for said land at said trustee's sale, a sum sufficient to satisfy the indebtedness then due to Daniel A. McColgan and secured by said first deed of trust.

On July 21, 1914, forty days before the year's period of redemption expired during which said Frederick V. Lineker could have redeemed the said land from the said execution sale under said judgment in favor of said J. A. Williams against Norvena E. Lineker, the said Daniel A. McColgan purchased, with his own money, and for his own exclusive use and benefit, from said William E. Crittendon, the said certificate of purchase and on August 20, 1914, the said Daniel A. McColgan, as the successor in interest of said William C. Crittendon, became entitled to the deed to said land, from said Sheriff of the County of Stanislaus, by virtue of said writ of execution, no redemption of said land from said execution sale having been made. On the 2d day of September, 1914, and prior to said sale under said first deed of trust, said Sheriff of said County of Stanislaus, executed and delivered his deed [37] conveying said land, by virtue of such execution, to said Daniel A. McColgan and said Daniel A. McColgan thus succeeded to all the rights, title and interest in said land which Frederick V. Lineker or Norvena E. Lineker owned on the said 7th day of August, 1913, the date when said Sheriff levied said execution on said land. Said Daniel A. McColgan, neither prior nor subsequent to the purchase of said certificate of purchase from said William E. Crittendon, made any agreement in writing or otherwise, with said Frederick V. Lineker, or Norvena E, Lineker, or any person representing them, that said Daniel A. McColgan should purchase or acquire said certificate of purchase, and the

rights of said William E. Crittendon, thereunder for the use or benefit of said Frederick V. Lineker or Norvena E. Lineker, and neither said Frederick V. Lineker nor Norvena E. Lineker ever made any agreement or promise to repay to said Daniel A. McColgan the sum which he paid to said William C. Crittendon, with his own money, for said certificate of purchase.

After the delivery of said Sheriff's deed to said Daniel A. McColgan, and after the recordation of said Sheriff's deed, the said sale of said land under said first deed of trust was held on September 2, 1914. On September 2, 1914, and prior to said sale said Daniel A. McColgan had invested and laid out in and about said transactions a sum which, including the indebtedness due and owing to said Daniel A. McColgan and secured by said deed of trust and also the amount which said Daniel A. McColgan had so paid on his own account to said William C. Crittenden for said certificate of purchase, amounted, with interest thereon, to $10,016.00 and said Daniel A. McColgan on said 2d day of September, 1914, at said sale, was prepared and intended to bid for said land at said sale a sum of at least $10,016.00, which represented said Daniel A. McColgan's entire outlay and interest thereon, as aforesaid, and L. V. Dennett was informed of that fact; and said L. V. Dennett, [38] who wished to save the land for said Frederick V. Lineker and Norvena E. Lineker, and who then and there believed it to be worth a sum in excess of $14,000.00, was aware and informed that in order

to prevent one or some of the holders of said liens from purchasing said land at said trustee's sale, it would be necessary for said Frederick V. Lineker or Norvena E. Lineker to bid at said sale at least a sum equal to the said sum of $10,016, representing the total outlay of said Daniel A. McColgan, as aforesaid, and the sum of $2380.00, and interest, representing the amount of said liens which had been imposed on said land subsequent to said first deed of trust.

On the morning of said 2d day of September, 1914, and prior to said sale, the said L. V. Dennett, representing said Norvena E. Lineker and Frederick E. Lineker, decided that it would be necessary, or expedient, for him to bid at least $14,000.00 for said land, in order to secure the title to said land for said Frederick E. Lineker and Norvena E. Lineker. At that time said Frederick V. Lineker and Norvena E. Lineker, by said L. V. Dennett, had made arrangements to borrow the sum of $13,000.00 from Annie Connors upon the security of a deed of trust to be executed upon and after the purchase of said land at said sale, under said first deed of trust, and to be a first encumbrance on said land. Said L. V. Dennett, representing said Frederick V. Lineker and Norvena E. Lineker, as aforesaid, requested said D. A. McColgan to lend to said Frederick V. Lineker and Norvena E. Lineker the sum of $1000.00 so that, by adding it to the $13,000.00 to be borrowed from Annie Connors the said L. V. Dennett would have $14,000.00 for which to pay for said land at said sale in order to prevent

the title to said land from going to a stranger, and said Daniel A. McColgan then and there agreed to lend said $1000.00 to said Frederick V. Lineker and Norvena E. Lineker. Said L. V. Dennett decided, prior to said sale, that it would be necessary and expedient [39] to pay to said Annie Connors, six months' interest on said sum of $13,000.00, in advance, and said L. V. Dennett requested said Daniel A. McColgan to lend to said Frederick V. Lineker and Norvena E. Lineker said sum, amounting to $455.00, and said Daniel A. McColgan agreed to lend said sum of $455.00 to said Frederick V. Lineker and Norvena E. Lineker. Said L. V. Dennett also at said time informed said Daniel A. McColgan that said Frederick V. Lineker and Norvena E. Lineker desired to borrow from said Daniel A. McColgan, for their personal use, an additional sum of $1000.00, and said Daniel A. McColgan agreed to lend said additional sum of $1000.00 to said Frederick V. Lineker and Norvena E. Lineker. Said L. V. Dennett then and there, and prior to said sale on said September 2, 1914, informed said Daniel A. McColgan that it was the intention of said Frederick V. Lineker and Norvena E. Lineker to purchase said land at said trustee's sale in the name of R. S. Marshall, as agent and trustee for said Frederick V. Lineker and Norvena E. Lineker, and to have the trustee's deed made to said R. S. Marshall, and to have said R. S. Marshall and his wife Olive H. Marshall, immediately after said sale under said first deed of trust, execute to trustees for said Annie Connors, a deed of trust which would

be a first encumbrance on said land for the benefit and security of said Annie Connors, and to secure the payment to said Annie Connors of said sum of $13,000.00, so to be loaned by said Annie Connors, and to have said R. H. Marshall and Olive H. Marshall, his wife, immediately thereafter execute to trustees for said Daniel A. McColgan a note for $2455.00, representing the aggregate sum which said Daniel A. McColgan had that day agreed to lend to said Frederick V. Lineker and Norvena E. Lineker, and a deed of trust to trustees to be selected by said Daniel A. McColgan as security for the payment of said promissory note for $2455.00. Said Daniel A. McColgan did not object to the arrangement so proposed by L. V. Dennett, as the representative and attorney for said Frederick [40] V. Lineker and Norvena E. Lineker. Thereupon the said trustee, R. McColgan, offered the said land for sale at the time and place designated in the notice of sale, and in accordance with the terms of said first deed of trust. There were a number of competing bids made for said land at said sale and said R. S. Marshall bid for said land at said sale the sum of $14,000.00, which was the highest and best bid and said land was sold by R. McColgan, as said trustee, to R. S. Marshall for the said sum of $14,000.00, and said R. McColgan, as said trustee, then and there executed to said R. S. Marshall a deed conveying and granting said land to said R. S. Marshall, in accordance with the terms of said first deed of trust, for the sum of $14,000.00. Immediately thereafter said R. S. Marshall and Olive H.

Marshall, his wife, at the request of L. V. Dennett as the attorney for said Frederick V. Lineker and Norvena E. Lineker, executed to M. J. Connors and B. M. Lyon, trustees for said Annie Connors, their deed of trust by which they conveyed said land to said trustees as security for the payment to said Annie Connors of the said sum of $13,000.00, so loaned by her, as aforesaid. Immediately thereafter the said R. S. Marshall and Olive H. Marshall, his wife, executed to R. McColgan and Eustace Cullinan, as trustees, their deed of trust, conveying said loan to R. McColgan and Eustace Cullinan as trustees, as security for the payment to said Daniel A. McColgan of said sum of $2,455.00, which had that day been loaned and advanced by said Daniel A. McColgan to said R. S. Marshall, as agent and trustee for said Frederick V. Lineker and Norvena E. Lineker, and evidenced by the promissory note of said R. S. Marshall and Olive H. Marshall, his wife, for $2,455.00, which was then and there executed to said Daniel A. McColgan. Said deed of trust to R. McColgan and Eustace Cullinan, as such trustees, is herein designated as the second deed of trust. Said Daniel A. McColgan designated said Eustace Cullinan as one of said trustees without consulting said Eustace Cullinan or without the knowledge [41] of said Eustace Cullinan, and said Eustace Cullinan was not, on or prior to said 2d day of September, 1914, informed or aware of the particulars of any of the transactions hereinbefore mentioned.

Thereafter, on the 22d day of January, 1917, on the demand of said Daniel A. McColgan, and in accordance with the terms of said second deed of trust, said R. McColgan and Eustace Cullinan, as trustees in said second deed of trust, offered said land for sale, and sold same, subject to said deed of trust for the benefit and security of said Annie Connors, as aforesaid. E. C. Peck, on said 22d day of January, 1917, at said sale under said second deed of trust, bid and offered for said land the sum of $4,195.79, which was then the amount of indebtedness due, owing and unpaid to said Daniel A. McColgan from said R. S. Marshall and Olive H. Marshall, his wife, under the terms of said second deed of trust and the repayment of which was secured by said second deed of trust; and said E. C. Peck was the highest and best bidder of said sale and said R. McColgan and Eustace Cullinan, as such trustees, on said 22d day of January, 1917, sold such real property, subject to said deed of trust for the benefit and security of said Annie Connor, to said E. C. Peck, for the said sum of $4,195.79 and executed on said date their deed as such trustees, in accordance with the terms of said second deed of trust, by which they conveyed and granted to said E. C. Peck the said land for said sum of $4,195.79, and said R. McColgan, one of said trustees, received the said sum of $4,195.79 from said E. C. Peck and paid and delivered the same to said Daniel A. McColgan in satisfaction of the indebtedness so secured by said second deed of trust.

Said R. McColgan, trustee in said first deed of trust, after said sale paid to said Daniel A. McColgan said entire sum of $14,000.00.

Said defendants are informed and believe and on such information and belief allege that none of said liens for the [42] aggregate principal sum of $2380.00 has been satisfied or released except as they may have been released from said land by said sale under said first deed of trust.

All of the surplus of said sum of $4,000.00, after the payment and satisfaction of the indebtedness due and owing to said Daniel A. McColgan from Norvena E. Lineker and secured by said first deed of trust, belonged to said Daniel A. McColgan, as the successor in interest of said William C. Crittendon, as aforesaid, and if said surplus had not so gone and belonged to said Daniel A. McColgan it would have gone and belonged to said William C. Crittendon, but not to said Frederick V. Lineker or said Norvena E. Lineker. [43]

XV.

SECOND SPECIAL DEFENSE—AN ACCOUNT STATED.

And as a further separate answer and defense defendants allege that on the 2d day of September, 1914, and at the time of the execution of said deed of trust of that date, to wit, said second deed of trust, an account was stated between said Daniel A. McColgan, as creditor, and said Frederick V. Lineker and Norvena E. Lineker, and each of them as debtors, respecting all sums due or owing to said Daniel A. McColgan under said first deed of trust, and all

offsets thereto, and all sums loaned by said Daniel A. McColgan to Frederick V. Lineker or Norvena E. Lineker or R. S. Marshall as the agent or trustee of either or both of them, prior to or on said 2d day of September, 1914, and respecting all transactions referred to in plaintiffs' amended bill of complaint herein, or in this answer, as having occurred on or prior to September 2d, 1914, and it was then and there agreed and determined by and between said Daniel A. McColgan, on the one hand, and said Frederick V. Lineker and Norvena E. Lineker, on the other hand, that there was then a balance due, owing and unpaid from Frederick V. Lineker and Norvena E. Lineker or either of them to Daniel A. McColgan of $2,455.00, and a promissory note for $2,455.00, payable to Daniel A. McColgan and said second deed of trust, securing the payment of the same, were then and there at the request of said Frederick V. Lineker and Norvena E. Lineker, executed by R. S. Marshall as agent and trustee for said Frederick V. Lineker and Norvena E. Lineker, and as evidence of said indebtedness and of the balance so found due, owing and unpaid to said Daniel A. McColgan on the said statement of said account; and said Frederick V. Lineker and Norvena E. Lineker, and each of them, are now barred and estopped, by reason of the foregoing facts and of the stating of said account as aforesaid, from denying or disputing that on said 2d day of September, 1914, there was due, owing and unpaid from said Frederick V. Lineker and

Norvena E. Lineker, or either of them, to said Daniel A. McColgan said sum of $2,455.00. [44]

XVI.

THIRD SPECIAL DEFENSE—A FORMER ADJUDICATION.

And for a further and separate answer and defense, and as a plea in bar to the maintenance of this suit by plaintiffs, said defendants allege the following facts:

Prior to the 22d day of January, 1917, when said R. McColgan and Eustace Cullinan, as trustees under said deed of trust dated September 2, 1914, sold said land, but after notice of such intended sale had been given and published by said trustees in accordance with the terms of said deed of trust, the said R. S. Marshall and Olive H. Marshall, who were the makers of said promissory note for $2,455.00 dated September 2d, 1914, and the grantors in said second deed of trust, securing the same, said Marshall being the agent, trustee, representative and privy of said Frederick V. Lineker and Norvena E. Lineker, as aforesaid, commenced, on December 3, 1916, an action in the Superior Court of the State of California, in and for the County of Stanislaus, against said Daniel A. McColgan and said R. McColgan and Eustace Cullinan, as such trustees, which action was entitled "R. S. Marshall and Olive H. Marshall, Plaintiffs, vs. Daniel A. McColgan, R. McColgan and Eustace Cullinan, as defendants," and was numbered 5353 on the files of said Superior Court.

In the complaint which said R. S. Marshall and Olive H. Marshall filed in said action they alleged the execution of said note for $2455.00, dated September 2, 1914, and said second deed of trust securing payment of the same; alleged that said R. McColgan and Eustace Cullinan, as such trustees, had given notice by publication that they would sell said real property, under the terms of said second deed of trust; alleged that said Daniel A. McColgan claimed that there was then due, owing and unpaid under the terms of said deed of trust a sum in excess of $4,000.00, and alleged that there was not due to said defendants in said action numbered 5353 a sum in excess of $2,200.00, and said R. S. Marshall [45] and Olive H. Marshall in their complaint in said action numbered 5353 alleged that they were ready, able and willing to pay all sums due to said Daniel A. McColgan as soon as they should be determined by said Superior Court, and prayed that said Daniel A. McColgan be required to account to said R. S. Marshall and Olive H. Marshall, for the application of said sum of $2,455.00 and for all his dealings and transactions in reference to said sum of $2,455.00, and that defendants in said action be restrained and enjoined from proceeding with said sale under the terms of said second deed of trust until the final judgment and decree should be entered in said action, and for such other and further relief as to the Court should seem meet. On the application of R. S. Marshall and Olive H. Marshall, plaintiffs in said action numbered 5353 the said Superior Court issued an order so restrain-

ing said defendants from so proceeding with said sale, which restraining order remained in force and effect until final judgment was rendered and entered in said action as hereinafter set forth. In said action numbered 5353 said Daniel A. McColgan and said R. McColgan and Eustace Cullinan filed their answer in which they alleged that there was due, owing and unpaid to said Daniel A. McColgan and secured by said deed of trust dated September 2, 1914, a sum in excess of $4,820.21. Said action was tried on the merits on the 8th day of December, 1916, on the issues joined by said complaint and answer, and the principal question of law or fact litigated at said trial was the determination of the amount which was due, owing and unpaid from said R. S. Marshall and Olive H. Marshall to Daniel A. McColgan and secured by said deed of trust dated September 2, 1914. After taking evidence from both sides at the trial of said action, and after said Daniel A. McColgan had rendered therein a complete account concerning the sums due, owing and unpaid to him and secured by said deed of trust of September 2, 1914, the said Superior Court (by the Honorable [46] L. W. Fulkerth, Judge thereof) duly gave, made and entered its judgment (findings of fact having been waived by the parties) in which said Court adjudged that Daniel A. McColgan have and recover from R. S. Marshall and Olive H. Marshall the sum of $4,110.01, together with interest on $3,949.51 of said sum at the rate of one per cent per month from December 6, 1916, and adjudged further that the payment of said

amount was secured by said second deed of trust, and that unless said amount be paid to said Daniel A. McColgan by said R. S. Marshall and Olive H. Marshall, the trustees, to wit, said R. McColgan and Eustace Cullinan, in said second deed of trust may proceed with the sale of said premises described in said second deed of trust and shall, upon the sale thereof being made, deduct from the proceeds of such sale the sum of $4,110.01, together with interest on $3,949.51 as aforesaid. Said judgment was not satisfied prior to the sale which occurred January 22, 1914, as hereinafter set forth.

On the 22d day of January, 1917, said R. McColgan and Eustace Cullinan, as such trustees, sold and conveyed said real property (subject to a deed of trust securing the payment of $13,000.00 to one Annie Connors) under and in accordance with the terms of said second deed of trust and of said judgment to said E. C. Peck for the sum of $4,195.79, which was the precise sum then due, owing and unpaid on the debt secured by said deed of trust, as determined by said judgment, and said R. McColgan, one of such trustees, received said sum and paid said sum of $4,195.79 to said Daniel A. McColgan.

No appeal was taken from said judgment and said judgment so given, made and entered in said action numbered 5353 has become final and has been fully satisfied by said sale and the payment of said sum to said Daniel A. McColgan. Said action was so commenced and prosecuted by said R. S. Marshall and Olive H. [47] Marshall as the trustees and agents of, and for the benefit of, said Frederick V.

Lineker and Norvena E. Lineker, and said Frederick V. Lineker and said Norvena E. Lineker, were privies to said action and judgment and are, and each of them is, barred and estopped by said judgment so given, made and entered in said action numbered 5353 from maintaining this action against any of the defendants herein and especially against the defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan, and in particular are barred and estopped by said judgment from maintaining or asserting in this suit or elsewhere that the sum specified in said judgment was not so due, owing and unpaid to Daniel A. McColgan at the time of the rendition of said judgment and on the 22d day of January, 1917, at the time of such sale. [48]

XVII.

FOURTH SPECIAL DEFENSE—ANOTHER ACTION PENDING.

And as a further and separate answer and defense to said action and as a plea in abatement and estoppel thereto, said defendants allege the following facts:

Prior to the 22d day of January, 1917, when said R. McColgan and Eustace Cullinan, as trustees under said deed of trust dated September 2, 1914, and herein called the second deed of trust, sold said land as aforesaid, but after notice of such intended sale had been given and published by said trustees, in accordance with the terms of said second deed of trust, said Frederick V. Lineker, who is also called Fred V. Lineker, on the 27th day of November, 1916, commenced in the Superior Court of the

State of California in and for the County of Stanislaus, an action which was numbered 5433 on the files of said court. A copy of said Frederick V. Lineker's complaint in said action is annexed hereto, marked Exhibit "A" and made a part hereof.

Defendants D. A. McColgan, R. McColgan and Eustace Cullinan filed in said action their answer. A copy of said answer is annexed hereto, marked Exhibit "B" and made a part hereof.

Said action was thereafter and before the trial thereof dismissed as against said R. S. Marshall and Olive H. Marshal, his wife, by the plaintiff therein. Thereafter said action came on regularly for trial before the said Superior Court of the State of California, in and for the County of Stanislaus, in Department Number 2 thereof, before Honorable William H. Langdon, Judge thereof, on the issues joined therein by said complaint and by the answer thereto of said defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan, and evidence was heard and the matter submitted and on the 2d day of March, 1917, said Superior Court made and filed its findings of fact and conclusions of law and gave, made and entered judgment thereon in favor of defendants Daniel A. McColgan, R. McColgan and Eustace [49] Cullinan, and against the said Frederick V. Lineker.

Thereafter, after proceedings duly and regularly had in that behalf, the said Superior Court of the State of California, in and for the County of Stanislaus, on motion of said Frederick V. Lineker on

the 6th day of June, 1917, gave, made and entered an order that a new trial of said action be granted.

Thereafter, the said action came on again regularly for such new and second trial and was tried on or about the 20th day of September, 1917, before the said Superior Court, Department Number 2 thereof, Honorable William H. Langdon, Judge thereof, sitting without a jury, and subsequent days until completed, and evidence having been introduced by all parties and the cause submitted the said Superior Court, on the 30th day of April, 1918, in said action, gave, made and entered its findings of fact and conclusions of law, a copy of which is annexed hereto, marked Exhibit "C" and made a part hereof, and thereafter, on said 30th day of April, 1918, said Superior Court in said action gave, made and entered its judgment therein, a copy of which judgment is annexed hereto, marked Exhibit "D," and made a part hereof.

Thereafter, the said Frederick V. Lineker took an appeal from said judgment so given, made and entered in said action to the Supreme Court of the State of California, and said appeal is now pending and undecided in said Supreme Court of the State of California.

Said Fred V. Lineker commenced and prosecuted said action and now maintains the same in his own interest and also as the assignee, representative, agent and trustee of his said wife, Norvena Lineker, and for her benefit and said Norvena Lineker was and is privy to said action numbered 5344.

Plaintiffs in this suit are barred and estopped by the pendency of said action numbered 5344 from maintaining or proceeding with this suit in this court and this suit ought to be abated and stopped until the final determination of said action numbered 5344. [50]

In said action numbered 5344 said Frederick V. Lineker appeared and acted as the successor in interest of Norvena Lineker and the identical issues of fact and of law were involved and litigated and determined between Norvena Lineker and Frederick V. Lineker, on the one part, and Daniel A. McColgan, R. McColgan and Eustace Cullinan, on the other part, that are tendered and involved in this action in which this answer is filed, including especially but not exclusively the questions (a) whether any portion of said sum of $14,000.00, so paid by R. S. Marshall for said land at said sale held on September 2, 1914, under said first deed of trust, is or was due or owing to, or held in trust for, said Norvena Lineker or Frederick V. Lineker, and (b) whether said Daniel A. McColgan purchased and acquired said certificate of purchase from W. C. Crittendon and subsequently took and acquired the title to said land under said Sheriff's deed in trust for Norvena Lineker, or Frederick V. Lineker or for his own use and benefit, (c) whether said sum of $2,455.00 was actually so loaned by Daniel A. McColgan to R. S. Marshall and Olive H. Marshall, and secured by said second deed of trust and whether said R. S. Marshall in that transaction acted as the agent and trustee for said Frederick

V. Lineker and whether said Frederick V. Lineker actually received the use and benefit of said sum of $2,455.00 so loaned and whether the execution of said second deed of trust was a *bona fide* transaction and (d) whether the execution of said promissory note for $2,455.00 on September 2, 1914, by R. S. Marshall and Olive H. Marshall, his wife, as the agent and representative of Frederick V. Lineker, was an account stated between Frederick V. Lineker and Daniel A. McColgan as of that date, of all debts and financial transactions between them. [51]

XVIII.

FIFTH SPECIAL DEFENSE — RATIFICATION.

As a further and separate answer and defense to said action the said defendants allege that since the 22d day of January, 1917, when said sale was so made under said second deed of trust, the said Frederick V. Lineker and Norvena Lineker have ratified and confirmed the said sale so made on the 22d day of January, 1917, under said second deed of trust, and have ratified and confirmed the said sale made by said R. McColgan as such trustee under said first deed of trust on the 2d day of September, 1914, as aforesaid and have ratified and confirmed the said account so stated as aforesaid by the said Daniel A. McColgan on the one hand and said Frederick V. Lineker and Norvena Lineker on the other hand, on the said 2d day of September, 1914. [52]

XIX.

SIXTH SPECIAL DEFENSE—RATIFICATION, INDEMNIFICATION, AND ELECTION OF ANOTHER REMEDY.

And for a further and separate answer and defense to said action the said defendants allege that on or about the 30th day of October, 1918, said Norvena Lineker and Frederick V. Lineker commenced an action in the said Southern Division of the United States District Court for the Northern District of California, Second Division, in which said Norvena Lineker and Frederick V. Lineker were plaintiffs and one Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon were defendants, which action was an action at law and is numbered 16195 on the files of said court; that in their complaint in said action numbered 16195 said Norvena Lineker and Frederick V. Lineker alleged, among other things, the execution by said Norvena Lineker (then Norvena Svensen) on or about the 20th day of June, 1910, of said first deed of trust; alleged that said note of $2850.00 representing the said original sum borrowed from said Daniel A. McColgan and secured by said first deed of trust was executed by said Norvena Lineker and said money was so borrowed by Norvena Lineker at the request of said Mary J. Dillon and her son William Winter and that the said sum of $2850.00 was on the said 20th day of June, 1910, immediately turned over by said Norvena Lineker to said William Winter for the use and benefit of said defendant Mary J. Dillon who received the

whole amount thereof; alleged that before said Norvena Lineker so borrowed said money or executed said first deed of trust the said William Winter, at the direction and suggestion of and in conspiracy with said Mary J. Dillon, stated and promised to said Norvena Lineker (then Norvena Svensen) that they would pay off all money so borrowed from said Daniel A. McColgan and satisfy such debt to said Daniel A. McColgan and that they would save her, the said Norvena Lineker, harmless from any loss or damage in connection therewith; alleged that said [53] Norvena Lineker borrowed said sum of $2850.00 and executed said first deed of trust in reliance upon such statements and representations to her; and it is further alleged by said Norvena Lineker and Frederick V. Lineker in their complaint in said action numbered 16195 that on or about the 22d day of April, 1911 said Daniel A. McColgan demanded of said Norvena Lineker that she forthwith pay to him the amount of said promissory note of $2850.00 and interest thereon and then told her that if she failed to do so he would cause her interest in said property to be sold; and it was further alleged in said complaint in said action numbered 16195 that immediately after the said Daniel A. McColgan so demanded the payment of said note the said Norvena Lineker went to see the said Mary J. Dillon and demanded of her that she immediately pay and satisfy said note and interest and procure the satisfaction and cancellation of said trust deed, to wit said first deed of trust, and that the said Norvena Lineker

then and there told said Mary J. Dillon that if she, said Mary J. Dillon, failed to pay and satisfy said note forthwith and cause said trust deed to be satisfied and discharged, she, said Norvena Lineker, would immediately bring action against the said Mary J. Dillon and her son William Winter to recover the amount of said note; and it was further alleged in said complaint in said action numbered 16195 that thereupon the said Mary J. Dillon asked and importuned said Norvena Lineker not to begin or prosecute any action against the said Mary J. Dillon or her son William Winter to recover said money borrowed on said note from Daniel A. McColgan and secured by said trust deed; and it was further alleged in said complaint in said action numbered 16195 that the said Mary J. Dillon did then and there promise and agree to and with the said Norvena Lineker, that if she, the said Norvena Lineker, would refrain from instituting or prosecuting any action against said Mary J. Dillon, or said William Winter, concerning said money secured by said trust [54] deed, the said Mary J. Dillon would hold and save the said Norvena Lineker harmless from any and all loss or damage by reason of the making of said note or said trust deed and that the said Mary J. Dillon would cause said debt and interest to be paid and discharged and would procure said trust deed to be paid and satisfied, and would indemnify and save harmless the said Norvena Lineker from any loss or damage whatsoever in connection with said note and trust deed; and it was further alleged in said

complaint in said action numbered 16195 that relying upon said Mary J. Dillon's promises to save here harmless from any and all loss as aforesaid the said Norvena Lineker refrained from bringing any action to recover such money from said Mary J. Dillon or her son William Winter, or either of them, and had not since commenced or prosecuted such action; and it was further alleged in said complaint in said action numbered 16195 that thereafter the said Daniel A. McColgan took various proceedings under the said trust deed for the purpose of obtaining the money secured thereby and large expense was incurred in connection therewith; that several adjournments of the sale of said property under said trust deed were had from time to time and further expense thereby incurred and further expenses for attorneys' fees and the like were incurred by the said Norvena Lineker in an endeavor to prevent the sale of said property and a loss thereof to said Norvena Lineker, and that the said Daniel A. McColgan caused said property to be sold under said trust deed, and various other proceedings were had and taken by and on behalf of the said Daniel A. McColgan which resulted in said Norvena Lineker being deprived of possession of said land and of her interest therein and of the rents, issues and profits thereof to her loss and damage in the sum of $35,000.00; and it was further alleged in said complaint in said action numbered 16195 that the said Mary J. Dillon failed and neglected to pay off said indebtedness incurred for her use and

[55] benefit and failed and neglected to pay off said note or the interest accumulated thereon and failed to pay and satisfy said trust deed, and that said Mary J. Dillon had failed to hold or save the said Norvena Lineker harmless from any or all loss caused to or incurred by said Norvena Lineker in connection with said note and trust deed made by Norvena Lineker in favor of said Daniel A. McColgan to the loss and damage of said Norvena Lineker in the sum of $35,000.00, and said defendants herein, to wit, said Daniel A. McColgan, R. McColgan and Eustace Cullinan, further allege that said Mary J. Dillon and Thomas B. Dillon, defendants in said action numbered 16195 filed an answer therein denying said agreement and denying that said Norvena Lineker had been damaged in the sum of $35,000.00 or in any sum as a result of the matters set forth in said complaint in said action numbered 16195; that thereafter a trial of said action numbered 16195 was had in said Court before a jury and the plaintiffs therein proved by evidence the sale of said land to R. S. Marshall under said first deed of trust on September 2, 1914, as aforesaid, the execution of said second deed of trust by said R. S. Marshall, the sale under said second deed of trust on January 22, 1917, as in this answer heretofore set forth, and proved that they had lost said land described in said deeds of trust, the same being the said land described in plaintiff's amended bill of complaint herein, and the rents, issues and profits thereof by virtue of said sale so held on January 22, 1917, under said second

deed of trust dated September 2, 1914, which had followed as a consequence upon the said sale under said first deed of trust and the execution of said second deed of trust as in this answer heretofore set forth, and that said sale under said second deed of trust was one of the various proceedings referred to in the complaint in said action numbered 16195 had and taken by or on behalf of said Daniel A. McColgan; and said Norvena Lineker and Frederick V. Lineker further [56] proved in said action numbered 16195 that said Norvena Lineker and Frederick V. Lineker were finally deprived of the title of said land, and of the said land, by said sale under said second deed of trust and that said sale under said second deed of trust was a proximate consequence and result of the failure of said Mary J. Dillon to pay said money that was so borrowed and secured by said first deed of trust as and in the complaint in said action numbered 16195 set forth; that in said action numbered 16195 the principal element of damage asserted by said Norvena Lineker and Frederick V. Lineker in said action numbered 16195 against said Mary J. Dillon was the value of said land of which said Norvena Lineker and Frederick V. Lineker were so deprived by said sale under said second deed of trust and in said action said Norvena Lineker and Frederick V. Lineker introduced evidence to prove the value of said land as an element of their damage for the breach of said indemnity contract so alleged to have been made by said Mary J. Dillon; and in said action num-

bered 16195 the Court instructed the jury that on the question of damages, should they see fit to find for the plaintiff in said action, they should take into consideration all the evidence in the case as to what the plaintiff's property was called upon to pay, what its value was, because she had lost it entirely so far as any evidence before said jury was concerned, and that, should they find that Mary J. Dillon had made the indemnity contract alleged in the complaint in said action numbered 16195, the said Mary J. Dillon was liable for everything that had been proximately lost through her failure to keep said contract to hold said Norvena Lineker harmless, and said Court instructed the jury in said action numbered 16195 that the damages which Norvena Lineker and Frederick V. Lineker in said action were entitled to recover from said Mary J. Dillon covered everything that had been lost to said Norvena Lineker and Frederick V. Lineker as shown by the evidence [57] in said action and it would be in law a proximate loss arising from the creating of the said original obligation uncared for, and that whatever the value of the property was that had been lost to said Norvena Lineker and Frederick V. Lineker would in law be a proximate loss resulting from the original transaction between said Norvena E. Lineker and Daniel A. McColgan concerning which said Mary J. Dillon had made such contract of indemnity and at the conclusion of the trial of said action numbered 16195 and on or about the 3d day of October, 1919, the jury in said action rendered a verdict in favor of

said Norvena Lineker and Frederick V. Lineker and against said Mary J. Dillon and Thomas B. Dillon for $32,000.00 damages sustained by the said Norvena Lineker by reason of the loss by her of said land as aforesaid; that thereafter, and on the 3d day of October, 1919, judgment was entered in said action numbered 16195 in favor of Norvena Lineker and Frederick V. Lineker and against said Mary J. Dillon and Thomas B. Dillon for $32,000.00 and $131.75 costs; that thereafter on January 5, 1920, the said Southern Division of the United States District Court of the Northern District of California, Second Division, by the Honorable William H. Van Fleet, Judge thereof, gave, made and entered its order that said judgment be modified so that it shall be satisfied out of the separate property of Mary J. Dillon and the community property of Mary J. Dillon and Thomas B. Dillon, and that the petition then pending of said defendants in said action numbered 16195 for a new trial thereof be granted unless the plaintiffs therein within ten days consent to a remission of the sum of $4000.00 from the amount of said judgment so that the amount of said judgment should be in the sum of $28,000.00 and for costs, and thereupon the said plaintiffs in said action numbered 16195, in open court, by their attorney duly consented to the reduction of the judgment therein in the [58] sum of $4000.00, and such remission being accepted by the Court it was thereupon ordered that the petition of defendants in said action for a new trial be and the same was denied and that judgment be entered

accordingly as of the date of said verdict, and thereafter on said 5th day of January, 1920, judgment was duly entered in said action nunc pro tunc as of the 3d day of October, 1919, in favor of said Norvena Lineker and Frederick V. Lineker and against said Mary J. Dillon and Thomas B. Dillon in accordance with the order of said Court for the sum of $28,000 and costs, and defendants herein are informed and believe and upon such information and belief allege that the said Norvena Lineker and Frederick V. Lineker have collected in partial satisfaction of said judgment the sum of $24,126.19; and defendants further allege that by commencing said action, and prosecuting the same to judgment and collecting such amount on such judgment the said defendants elected to ratify and confirm and they did ratify and confirm the said sale under said first deed of trust and the said sale under said second deed of trust and they waived and abandoned all right to have either of said sales set aside and they waived and abandoned all right to any further accounting from said Daniel A. McColgan for any of the transactions set forth in plaintiff's amended bill of complaint herein, and said judgment for $28,000.00 and costs is a full satisfaction and compensation and reimbursement of said Norvena Lineker and Frederick V. Lineker for all loss and damage suffered by them, or all or any money that might be due them from any of the defendants in this action by reason of any of the transactions referred to in said amended bill of complaint; and defendants further

allege that said sum of $28,000.00 is equal to and in excess of the value of said land, and exceeds the amount of all loss that said Frederick V. Lineker or Norvena E. Lineker has suffered by reason of any of the sales or transactions referred to in said amended bill of complaint herein. [59]

XX.

SEVENTH SPECIAL DEFENSE—LACHES.

And for a further and separate answer and defense said defendants allege that said plaintiffs have been guilty of laches, in and about the commencement of said action, and in and about the filing of their amended bill of complaint herein, in this, that they have neglected and delayed for an unreasonable and inequitable length of time the commencement of said action and the filing of their amended bill of complaint therein, and have allowed each and every one of the causes of action set forth in said amended bill of complaint to become barred and the same are barred by the provisions of sections 339 and 338 and 337 and 336 of the Code of Civil Procedure of the State of California; that more than five years elapsed after said sale under said first deed of trust, and more than three years elapsed after said plaintiffs had become informed and aware that said Daniel A. McColgan claimed said surplus of said $14,000.00 for himself, and for his own use and benefit, before said amended bill of complaint herein was filed herein; that the original complaint filed herein by plaintiffs set forth a cause of action to quiet title to said land, and sought no other relief; that

the causes of action for an accounting set forth in said amended bill of complaint were not mentioned in said original complaint and were first set forth in said amended bill of complaint; that the demand of plaintiffs for such accounting is, and at the time of the filing of said amended bill of complaint herein was stale and inequitable; and that plaintiffs have negligently delayed pleading each and every cause of action set forth in said amended bill of complaint beyond the period prescribed by the Statutes of Limitation of the State of California, and particularly sections 336, 337, 338 and 339 of the Code of Civil Procedure of the State of California within which actions on such respective causes of action could have been commenced, and that by reason of the [60] foregoing it would be unreasonable and inequitable for this court now to allow plaintiffs any of the relief which they are seeking against these defendants in this suit.

WHEREFORE, said defendants pray that plaintiffs take nothing by their suit, that this suit be abaited, and that said defendants have judgment against plaintiffs for their costs and for such other relief as may seem to the Court equitable.

CULLINAN & HICKEY,

Attorneys for Defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan.

State of California,
City and County of San Francisco,—ss.

Daniel A. McColgan, being first duly sworn, deposes and says: that he is one of the defendants

in the above-entitled action and makes this affidavit on behalf of himself and of the defendants R. McColgan and Eustace Cullinan; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on his information and belief and as to those matters he believes it to be true.

DANIEL A. McCOLGAN.

Subscribed and sworn to before me this 26th day of March, 1920.

[Seal] E. J. CASEY,

Notary Public in and for the City and County of San Francisco, State of California. [61]

Exhibit "A."

In the Superior Court of the State of California, in and for the County of Stanislaus.

No. 5344.

Dept. No. 2.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN and R. R. MARSHALL, and OLIVE H. MARSHALL, His Wife,

Defendants.

COMPLAINT.

Comes now plaintiff above named, and complains of defendants above named, and for cause of action alleges:

I.

That from the 19th day of November, 1907, down to the 18th day of August, 1913, one, Norvena E. S. Lineker (formerly Norvena E. Svensen) was the owner of that certain real property situate in the County of Stanislaus, State of California, and more particularly described as follows, to wit:

> All that portion of the Northwest quarter of Section Six (6) in Township Four (4) South, Range Nine (9) East, Mount Diablo Base and Meridian, lying North and West of the Paradise Road.

That said real property was on the 6th day of August, 1915, and had been for some time prior thereto, subject to a life interest therein in favor of Ole Svensen; that said Ole Svensen died on the 6th day of August, 1915; that thereafter proceedings were duly had and taken wherein and whereby the life estate of said Ole Svensen was thereby terminated, and the above-entitled court duly made and entered its decree terminating said life estate.

That said real property is the same real property [62] which was conveyed by defendant, R. S. Marshall, to defendants, R. McColgan and Eustace Cullinan, in the manner hereinafter alleged.

That on the 22d day of September, 1912, Norvena E. Svensen and Fred V. Lineker, plaintiff herein, intermarried, and ever since the said 22d day of

September, 1912, they have been and are now husband and wife.

That on the 18th day of August, 1913, said Norvena E. S. Lineker conveyed said real property by gift deed to plaintiff herein; that said conveyance was recorded in the office of the County Recorder of Stanislaus County on July 27, 1914, in volume 193 of Deeds at page 590 thereof, records of said County of Stanislaus.

II.

That at the time plaintiff acquired said real property the same was subject to an encumbrance thereon consisting of an indenture in writing, or Deed of Trust, made, executed and delivered on June 20, 1910, by said Norvena E. S. Lineker to said defendant, Robert McColgan, as trustee for said defendant, Daniel A. McColgan, to secure the payment by her of a promissory note in the sum of $2,850.00, made payable to said defendant, Daniel A. McColgan, by said Norvena E. S. Lineker.

That on or about the 23d day of April, 1914, as plaintiff is informed and believes and therefore alleges, said defendant, Daniel A. McColgan, caused said defendant, R. McColgan, who is the trustee named in said last-mentioned Deed of Trust, to sell at public auction the real property therein described, for the reason that said Norvena E. S. Lineker had, at that time, failed to perform certain of the terms and conditions in said Deed of Trust contained, and on her part to be kept and performed. That thereupon, said defendant, Robert McColgan, caused notice to [63] be given in ac-

cordance with the terms of said Deed of Trust, that he would, on May 25, 1914, sell at public auction, at a time and place set forth in said notice, the property described in said Deed of Trust, and being the same real property hereinbefore described. That said sale was postponed from time to time from said May 25, 1914, until the 2d day of September, 1914, on which day said sale was held, and said real property was sold thereat by said defendant, Robert McColgan, as such trustee, to said defendant, R. S. Marshall, pursuant to the agreement by and between said plaintiff and said defendant, Daniel A. McColgan, and in the manner hereinafter alleged.

III.

That after said notice of sale had been given in the manner prescribed by said Deed of Trust, and prior to the sale of said real property as hereinbefore mentioned, plaintiff and defendant, Daniel A. McColgan, made and entered into an agreement wherein and whereby they agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan, claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other liens subsisting against said real property not secured by said Deed of Trust.

That at that time plaintiff made a formal demand upon said defendant, Daniel A. McColgan, that he render an account of the amount claimed to be due to him by said Norvena E. S. Lineker, but that said defendant, Daniel A. McColgan, refused

to render any such account, though he then and there informed plaintiff that the said real property should be sold for the sum of $10,000.00, and which sum he informed plaintiff would be sufficient to repay the amount claimed to be due to him by said [64] Norvena E. S. Lineker, including the expenses of said sale, and also any other alleged liens subsisting against said real property, but not secured by said Deed of Trust.

That thereupon plaintiff and said defendant, Daniel A. McColgan, further agreed that plaintiff would bid the sum of $10,000.00 for said real property at said sale, but upon the further understanding and agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last-named defendant from said trustee in the manner hereinafter alleged, he, said Daniel A. McColgan, would not pay or cause to be paid, any of said alleged liens, until the same had been judicially determined to be valid and subsisting liens against said real property, and upon the further understanding that said defendant, Daniel A. McColgan, would account to plaintiff for all moneys coming into his hands as the proceeds of said sale.

IV.

That at the time of said agreement last aforesaid, said defendant, Daniel A. McColgan, knew the plaintiff was not possessed of said sum of $10,000.00, but that one, Annie Connors had agreed to loan plaintiff upon his promissory note the sum of $13,000.00, to be used by plaintiff in purchasing

cordance with the terms of said Deed of Trust, that he would, on May 25, 1914, sell at public auction, at a time and place set forth in said notice, the property described in said Deed of Trust, and being the same real property hereinbefore described. That said sale was postponed from time to time from said May 25, 1914, until the 2d day of September, 1914, on which day said sale was held, and said real property was sold thereat by said defendant, Robert McColgan, as such trustee, to said defendant, R. S. Marshall, pursuant to the agreement by and between said plaintiff and said defendant, Daniel A. McColgan, and in the manner hereinafter alleged.

III.

That after said notice of sale had been given in the manner prescribed by said Deed of Trust, and prior to the sale of said real property as hereinbefore mentioned, plaintiff and defendant, Daniel A. McColgan, made and entered into an agreement wherein and whereby they agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan, claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other liens subsisting against said real property not secured by said Deed of Trust.

That at that time plaintiff made a formal demand upon said defendant, Daniel A. McColgan, that he render an account of the amount claimed to be due to him by said Norvena E. S. Lineker, but that said defendant, Daniel A. McColgan, refused

to render any such account, though he then and there informed plaintiff that the said real property should be sold for the sum of $10,000.00, and which sum he informed plaintiff would be sufficient to repay the amount claimed to be due to him by said [64] Norvena E. S. Lineker, including the expenses of said sale, and also any other alleged liens subsisting against said real property, but not secured by said Deed of Trust.

That thereupon plaintiff and said defendant, Daniel A. McColgan, further agreed that plaintiff would bid the sum of $10,000.00 for said real property at said sale, but upon the further understanding and agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last-named defendant from said trustee in the manner hereinafter alleged, he, said Daniel A. McColgan, would not pay or cause to be paid, any of said alleged liens, until the same had been judicially determined to be valid and subsisting liens against said real property, and upon the further understanding that said defendant, Daniel A. McColgan, would account to plaintiff for all moneys coming into his hands as the proceeds of said sale.

IV.

That at the time of said agreement last aforesaid, said defendant, Daniel A. McColgan, knew the plaintiff was not possessed of said sum of $10,000.00, but that one, Annie Connors had agreed to loan plaintiff upon his promissory note the sum of $13,000.00, to be used by plaintiff in purchasing

said real property at said sale, and that the payment of said last-mentioned note was to be secured thereafter by an indenture in writing, wherein and whereby plaintiff, when he had acquired title thereto, was to convey said real property to said Annie Connors in trust for the purpose last aforesaid.

That thereafter and prior to said sale it was agreed between plaintiff and said defendant, Daniel A. McColgan, that for the purpose of securing said defendant, Daniel A. McColgan, in the event that he should be made to pay any of the liens [65] alleged to be subsisting against said real property, and which were not secured by the Deed of Trust first hereinbefore mentioned, that plaintiff would execute and deliver to said defendant, Daniel A. McColgan, his promissory note in the sum of $2,455.00, and that plaintiff, in order to secure the payment of said last-mentioned note, would execute and deliver to said defendant, Daniel A. McColgan, an indenture in writing wherein and whereby he would convey said real property, when he had acquired the title thereto, to said defendant, Daniel A. McColgan, in trust, for the purpose last aforesaid, but upon the condition that said last-mentioned Deed of Trust would be subject and subordinate to the Deed of Trust to be delivered to said Annie Connors as aforesaid.

V.

That on the 11th day of June, 1913, in an action pending in the Superior Court of the State of California, in and for the County of Alameda, one,

J. A. Williams, plaintiff therein, recovered a judgment against Norvena E. Svensen for the sum of $1,285.00, together with $15.00 costs; that in said action a writ of execution was issued to the Sheriff of said Stanislaus County on the 29th day of July, 1913, directing said Sheriff of the County of Stanislaus to satisfy judgment out of the property of said Norvena E. Svensen; that thereafter, and in pursuance of said writ of execution, A. S. Dingley, as said Sheriff of said County of Stanislaus, did, on the 7th day of August, 1913, levy upon the real property hereinbefore described and being the same real property described in said deed of trust, and after giving notice as required by law, said Sheriff of the County of Stanislaus sold said real property at public auction, in accordance with said writ of execution, and at said sale, which was held on the 30th day of August, 1913, the said Sheriff [66] of said County of Stanislaus sold said land to one, William C. Crittendon, who was the highest bidder thereat, for the sum of $1,361.20, and said Sheriff of said County of Stanislaus on said 30th day of August, 1913, issued to said William C. Crittendon his certificate of said sale, in accordance with the law, and a duplicate of said certificate was duly filed by said Sheriff of said County of Stanislaus in the office of the County Recorder of the County of Stanislaus, and there recorded on the 3d day of September 1913, in volume 3 of Certificate of Sale, at page 81 thereof. That thereafter, and prior to the purchase hereinafter alleged to have been made, plaintiff and said defendant, Daniel A. McColgan,

entered into an agreement wherein and whereby they agreed that said Daniel A. McColgan was to purchase for the use and benefit of plaintiff from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property, and in and to said certificate of sale, and to repay himself for the moneys thus expended by him out of the moneys coming into his hands from said trustee at said trustee's sale. And it was also further agreed and understood by and between plaintiff and said defendant, Daniel A. McColgan, that the sum of $10,000.00 herein first mentioned would be sufficient to cover the sum which would be expended by defendant, Daniel A. McColgan, in the purchase of said Judgment and certificate of sale.

That thereafter, and on the 15th day of July, 1914, said Daniel A. McColgan, in accordance with his agreement and understanding had with plaintiff, purchased for the use and benefit of plaintiff from said William C. Crittendon all the right, title and interest of said William C. Crittendon and in and to said real property, and in and to said certificate of sale, and said William C. Crittendon, on the 15th day of July, 1914, [67] executed to said Daniel A. McColgan an instrument in writing whereby said William C. Crittendon granted, sold, and assigned to Daniel A. McColgan the said certificate of sale, and all the right, title and interest of said William C. Crittendon in and to said certificate of sale, and in and to said real property therein described. That said instrument in writ-

ing, executed by said William C. Crittendon to said Defendant, Daniel A. McColgan, was recorded in the office of the County Recorder of said County of Stanislaus, at seventeen minutes past one o'clock P. M., on the 2d day of September, 1914, in Volume 3 of Miscellaneous, at page 343 thereof. That thereafter, and on the 2d day of September, 1914, the said W. S. Dingley, as Sheriff of said County of Stanislaus, executed to said Daniel A. McColgan, in accordance with the law, his deed reciting the facts of the issuance of said writ of execution, the sale thereunder, the issuance of his certificate of sale to said William C. Crittendon, as aforesaid, the assignment by said William C. Crittendon to said Daniel A. McColgan, as aforesaid, and granting, in accordance with law, and in pursuance of the statute in such cases made and provided, to said Daniel A. McColgan all the right, title and interest and claim which the said judgment debtor, Norvena E. Svensen, had on the said 30th day of August, 1913, or at any time afterwards, or on said 2d day of September, 1914, had in and to said land. That said deed from said Sheriff to said Daniel A. McColgan was recorded in the office of the County Recorder of said County of Stanislaus at thirteen minutes past two o'clock P. M. on the 2d day of September, 1914, in Volume 207 of Deeds at page 143 thereof.

That in the purchase of said judgment and certificate of sale last as aforesaid said defendant, Daniel A. McColgan, well knew that he was acting therein in accordance with his agreement with plaintiff to that end, and also that said purchase

last [68] aforesaid was made by said defendant, Daniel A. McColgan, for the use and benefit of plaintiff.

VI.

That after the agreement made and entered into by and between said defendant, Daniel A. McColgan, and plaintiff, and prior to the sale of the said real property as hereinafter alleged, plaintiff and defendant, R. S. Marshall, made and entered into an agreement wherein and whereby it was understood and agreed that said defendant, R. S. Marshall, should attend said sale, and purchase thereat for plaintiff the said real property hereinbefore described, and should bid thereat the sum of $15,455.00, or thereabouts for said real property; and that it was further agreed between the parties last aforesaid that said R. S. Marshall and Olive H. Marshall, his wife, should make, execute and deliver, as and for the act and deed of plaintiff, and at the special instance and request of plaintiff, the two promissory notes for the respective sums of $13,000.00 and $2,455.00, and the payment of which was to be secured in the manner aforesaid.

That thereupon, said defendant, R. S. Marshall, proceeded to carry out the terms of said agreement, and attended said sale on September 2, 1914, and bid thereat the sum of $14,000.00 for said real property, and thereupon said defendant, Robert McColgan, as such trustee, sold said real property to said defendant, R. S. Marshall, who paid therefor to said Robert McColgan as such trustee the said sum of $14,000.00 all in accordance with the understand-

ing and agreement had between said R. S. Marshall and plaintiff as aforesaid.

That plaintiff is informed and believes, and therefore alleges, that said sum of $14,000.00 less the expenses of said sale, was thereupon delivered and paid over to said defendant, [69] Daniel A. McColgan, by said defendant, Robert McColgan, as such trustee.

That said defendant R. S. Marshall, obtained the said sum of $14,000.00, so paid to said defendant, R. McColgan, as aforesaid, in accordance with an agreement to that end entered into with plaintiff in the manner aforesaid.

That plaintiff is also informed and believes, and therefore alleges, that said defendant, R. S. Marshall, and Olive H. Marshall, his wife, received from said Annie Connors, at the special instance and request of plaintiff, the sum of $13,000.00 and did, in accordance with the agreement to that end made and entered into by and between plaintiff and defendant, R. S. Marshall, make, execute and deliver, on September 2, 1914, to said Annie Connors, their promissory note in the sum of $13,000.00 and to secure the payment of said promissory note did make, execute and deliver on September 2, 1914, a certain indenture in writing, or deed of trust, wherein and whereby they conveyed in trust the said real property so purchased at said sale by said defendant, R. S. Marshall, as aforesaid, to M. J. Connors and B. M. Lyon, as trustees for said Annie Connors.

That said last-mentioned Deed of Trust was recorded on September 3, 1914, in the said office of

said County Recorder of said County of Stanislaus, in volume 198 of Trust Deeds, at page 634 thereof, records of said County of Stanislaus.

That neither said defendant, R. S. Marshall, nor Olive H. Marshall, his wife, ever had any negotiations or dealings with said Annie Connors relative to said loan of $13,000.00 but that all negotiations and dealings relative to said loan of $13,000.00 by said Annie Connors to plaintiff were had, made and entered into by and between plaintiff and said Annie Connors, and said sum of $13,000.00 was loaned by said Annie Connors to said defendants, [70] R. S. Marshall and Olive H. Marshall, his wife, for the use and benefit of plaintiff, and at plaintiff's special instance and request.

That in pursuance of the terms of said agreement between plaintiff and said defendant, R. S. Marshall, said Marshall, and Olive H. Marshall, his wife received from said defendant, Daniel A. McColgan, at the special instance and request of plaintiff, the said sum of $2,455.00 in accordance with the agreement to that end made and entered into by and between plaintiff and defendant, R. S. Marshall, and did, on September 2, 1914, make, execute and deliver, for the use and benefit of plaintiff as aforesaid, their promissory note to said defendant, Daniel A. McColgan, in the sum of $2,455.00, and to secure the payment thereof did execute an instrument in writing wherein and whereby they conveyed said real property to defendants R. McColgan and Eustace Cullinan, in trust for said defendant, Daniel A. McColgan, but which Deed of

Trust was subordinate to said Deed of Trust likewise executed by said defendants, R. S. Marshall and Olive H. Marshall, his wife, to said Annie Connors; that said instrument in writing securing the payment of the said sum of $2,455.00 was duly acknowledged by said R. S. Marshall and Olive H. Marshall, his wife, and was recorded at the request of said Daniel A. McColgan in the office of the County Recorder of the said County of Stanislaus, on September 3, 1914, in Liber 210 of Trust Deeds, at page 41 thereof, and to which instrument in writing or to a certified copy thereof, the plaintiff for greater certainty begs leave to refer.

That neither said defendant, R. S. Marshall, nor Olive H. Marshall, his wife, ever had any negotiations with said Daniel A. McColgan relative to said loan of $2,455.00, but that all negotiations and dealings relative to said loan of $2,455.00 by [71] said Daniel A. McColgan were had and taken by and between plaintiff and said Daniel A. McColgan, and said sum of $2,455.00 was loaned by said Daniel A. McColgan to said defendants, R. S. Marshall and Olive H. Marshall, his wife, for the use and benefit of plaintiff, and at plaintiff's special instance and request.

That all of the several agreements, negotiations and understandings had by and between plaintiff and said defendant, R. S. Marshall, were at all the times herein mentioned fully known to said defendant, Daniel A. McColgan, and said defendant, Daniel A. McColgan, knew that all of the acts and deeds of said R. S. Marshall and Olive H. Marshall,

his wife, as aforesaid, were had and taken for the benefit and use of plaintiff, and at plaintiff's special instance and request.

VII.

That said defendant, Daniel A. McColgan, has requested said defendants, R. McColgan and Eustace Cullinan, as the trustees named in that certain indenture in writing last aforesaid, to sell the real property described therein under and in accordance with the terms thereof, and that said defendants, R. McColgan and Eustace Cullinan, have given notice by publication that they will, as such trustees, sell at public auction the said real property, on Monday, the 4th day of December, A. D. 1916, at the hour of twelve o'clock noon of said day, at the office of said R. McColgan, Room No. 502, Claus Spreckels Building, in the City and County of San Francisco, State of California.

That plaintiff is informed and believes, and therefore alleges, that said defendants, R. McColgan and Eustace Cullinan, as such trustees, threaten to and will, at said time and place, last aforesaid, unless restrained by order of this Court, and before the matter can be heard on notice, sell said real property to satisfy the demand for said sum of money last aforesaid. [72]

VIII.

Plaintiff has repeatedly requested and demanded of said defendant, Daniel A. McColgan, that he render an account of the said sum of $14,000.00, and that he pay plaintiff such a sum as, upon such accounting, might appear to be justly due to him,

but said defendant, Daniel A. McColgan, wholly refuses and declines, and does still refuse and decline, to render any account of said sum of $14,000.00, or to pay to plaintiff the sum which is justly due or owing to him, in accordance with the agreement to that end had by and between plaintiff and defendant, Daniel A. McColgan.

That plaintiff is informed and believes, and therefore alleges, that the whole of said sum of $14,000.00 was not in fact paid, laid out or expended by said defendant, Daniel A. McColgan, in paying the amount due under the Deed of Trust first hereinbefore mentioned, or any liens alleged to be subsisting against said real property, but that a large amount of said sum of $14,000.00 has been retained by said Daniel A. McColgan contrary to and in violation of his agreement with plaintiff, as aforesaid, and that the amount so retained by said defendant, Daniel A. McColgan, can only be ascertained upon an accounting had of said defendant, Daniel A. McColgan.

That plaintiff alleges that there is justly due, owing and unpaid to him by said defendant, Daniel A. McColgan, as aforesaid, after deducting those charges, which, upon an accounting herein, may be found to be proper items of debit, considerably more than the said sum of $2,455.00.

IX.

Plaintiff alleges that the value of his equity in said real property is of far greater value than the amount alleged to [73] be due to defendant, Daniel A. McColgan, under and in accordance with

the terms of said promissory note for $2,455.00, and that the defendants can suffer no loss or injury if the proposed sale of said real property is delayed, while the plaintiff would suffer irreparable injury if said sale, heretofore advertised as aforesaid, should take place, as plaintiff would be without remedy of law if the defendants, R. McColgan and Eustace Cullinan, as such trustees, were permitted to sell the same; and that plaintiff has no plain, speedy or adequate remedy at law.

X.

That plaintiff had no knowledge or any means of knowledge of any of said acts or matters hereinbefore alleged to have been performed until one year last past, by reason of the fact that the acts and matters hereinbefore alleged to have been performed were peculiarly within the knowledge of defendants.

XI.

That said defendants, R. S. Marshall, and Olive H. Marshall, his wife, refused to join with plaintiff in bringing the above-entitled action, and for that reason are joined as parties defendant therein.

WHEREFORE, plaintiff prays for an order and decree of this Court:

1. Enjoining and restraining said defendants, R. McColgan and Eustace Cullinan, as such trustees, their agents, employees or attorneys, from selling or causing to be sold under the terms or in pursuance of the provisions of the Deed of Trust executed to said defendants, R. McColgan and Eustace Cullinan, as such trustees, by said defendants, R. S.

Marshall, and Olive H. Marshall, his wife, and bearing date September 2, 1914, the real property described therein, and being the same property mentioned and described in the complaint aforesaid. [74]

2. That said defendant, Daniel A. McColgan, be directed to render or set forth an account of all or every sum or sums of money which have come into his hands for or on account of plaintiff, and for the application thereof, and of dealings and transactions of said defendant, Daniel A. McColgan, in reference to said sum or sums of money.

3. That plaintiff have such further and other relief in the premises as to this Court shall seem meet and proper.

ALBERT C. AGNEW and
MILTON S. HAMILTON,
Attorneys for Plaintiff. [75]

State of California,
County of Alameda,—ss.

Fred V. Lineker, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that as to these matters he believes it to be true.

FRED V. LINEKER.

Subscribed and sworn to before me this 25th day of November, A. D. 1916.

ALBERT C. AGNEW,

Notary Public in and for the County of Alameda, State of California. [76]

Exhibit "B."

In the Superior Court of the State of California, in and for the County of Stanislaus.

No. 5344.

Dept. No. 2.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN, R. S. MARSHALL and OLIVE H. MARSHALL, His Wife,

Defendants.

ANSWER OF DEFENDANTS DANIEL A. McCOLGAN, R. McCOLGAN AND EUSTACE CULLINAN.

Defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan answering the complaint of plaintiff on file herein admit, deny and aver as follows, to wit:

I.

Said defendants have no information or belief upon the subject sufficient to enable them to answer the allegation in plaintiff's complaint that on the 18th day of August, 1913, said Norvena E. S. Line-

ker conveyed the real property described in said complaint by gift deed to plaintiff, or that said conveyance was recorded as set forth in plaintiff's complaint, and placing their denial on that ground said defendants deny that on the 18th day of August, 1913, or at any time said Norvena E. S. Lineker conveyed the said real property described in plaintiff's complaint by gift deed or otherwise to plaintiff and deny that said or any such conveyance was recorded in the office of the County Recorder of said Stanislaus County on July 27, 1914, or at any time.

II.

Said defendants allege that the deed of trust made, [77] executed and delivered on June 20, 1910, referred to in paragraph II of plaintiff's complaint, was so executed to secure not only the payment of the promissory note for twenty-eight hundred fifty (2850) dollars, referred to in paragraph II of plaintiff's complaint, but also other sums that should or might be loaned by said Daniel A. McColgan to said Norvena E. Svensen, and evidenced by the promissory note or notes of said Norvena E. Svensen; that thereafter, and on or about the 14th day of July, 1910, said Norvena E. Svensen executed to said Daniel A. McColgan her promissory note, dated July 14, 1910, and payable one day after date for seventeen hundred (1700) dollars, which note recited that it was secured by said deed of trust dated June 20, 1910, and which note was signed also by one William Winter as a comaker with said Norvena E. Svensen; that there-

after, said Norvena E. Svensen on or about the 3d day of January, 1913, executed to said Daniel A. McColgan, her promissory note, dated January 3, 1913, for seven hundred and fifty (750) dollars, which note was payable six (6) months after the date thereof, and which note recited that it was secured by said deed of trust dated June 20, 1910; and that on the 23d day of April, 1914, neither said note for twenty-eight hundred fifty (2850) dollars, nor said note for seventeen hundred (1700) dollars, nor said note for seven hundred and fifty (750) dollars had been paid, and all of said notes, together with a large amount of interest thereon, were due, owing and unpaid.

III.

Said defendants allege that the correct name of said defendant described in said complaint as "Robert McColgan" is "Reginald McColgan," who is also known and designated as R. McColgan. [78]

IV.

Allege that the sale of said real property, which sale is referred to in paragraph II of plaintiff's complaint, was postponed from May 24, 1914, from time to time, until September 2, 1914, by the trustees, in said deed of trust named, at the request of said Norvena E. Lineker, formerly and otherwise known as Norvena E. Svensen; that said defendants admit that said sale was held on the 2d day of September, 1914, and that said real property was sold thereat by said defendant, R. McColgan as such trustee to said defendant, R. S. Marshall, but deny that said property was so sold, or that

said or any sale thereof was held pursuant to the or any agreement by and between said plaintiff and said defendant, Daniel A. McColgan, or in and in, the manner in said complaint alleged.

V.

Said defendants deny that after said notice of sale had been given in the manner prescribed by said deed of trust, and prior or prior to the sale of said real property, as mentioned in said complaint, or at any time, or at all, plaintiff and defendant, Daniel A. McColgan made or entered into any agreement wherein or whereby they agreed that plaintiff would purchase said real property at said or any sale for any sum of money or for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other lien subsisting against said real property not secured by said deed of trust and deny that said agreement referred to in paragraph III of plaintiff's complaint, or any agreement similar in character was ever made or entered into by said [79] Daniel A. McColgan and said plaintiff at any time or at all. Deny that said plaintiff at the time referred to in paragraph III of plaintiff's complaint made a formal or any demand upon said defendant, Daniel A. McColgan, that he rendered an account of the amount claimed to be due to him by said Norvena E. S. Lineker and deny that said defendant, Daniel A. McColgan refused to render any such account and deny that said Daniel A. McColgan then or there or at any time or

place informed plaintiff that the said real property should be sold for the sum of ten thousand (10,000) dollars and deny that said Daniel A. McColgan at any time or place informed plaintiff that said sum of ten thousand (10,000) dollars would be sufficient to repay the amount claimed to be due to him by said Norvena E. S. Lineker, including or excluding the expenses of said sale and also any other alleged lien subsisting against said real property but not secured by said deed of trust or otherwise. Deny that thereupon or ever or at all the plaintiff and said defendant, Daniel A. McColgan further or at all agreed that plaintiff would bid the sum of ten thousand (10,000) dollars, or any sum for said or any real property at said or any sale and deny that upon the further or any understanding or agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last named defendant, to wit, said Daniel A. McColgan, from said trustee, to wit, said R. McColgan, in the manner in said complaint alleged or otherwise, he, said Daniel A. McColgan would not pay or cause to be paid any of said alleged liens until the same had been judicially determined to be valid and subsisting or valid or subsisting liens aganist the said real property and deny that said Daniel A. McColgan ever made the further or any understanding or agreement with said plaintiff that said Daniel A. [80] McColgan would account to plaintiff for all or any moneys coming into his hands as the proceeds of said sale and said defendants deny that said Daniel A. McColgan made

with said plaintiff or any other person any such agreement, or had with plaintiff any such understanding as is set forth or referred to in paragraph III of plaintiff's complaint.

VI.

Said defendants deny that at the time of any agreement referred to in plaintiff's complaint or at any other time said defendant, Daniel A. McColgan knew that plaintiff was not possessed of said sum of ten thousand (10,000) dollars, or of the sum of ten thousand (10,000) dollars but that one or that one Annie Connors had agreed to lend plaintiff on his promissory note or otherwise, the sum of thirteen thousand (13,000) dollars to be used by plaintiff in purchasing said real property at said sale, or for any other purpose and that or that the payment of said last mentioned note or any note or sum of money was to be secured thereafter or at any other time by an indenture in writing wherein and whereby plaintiff when he had acquired title thereto was to convey said real property to said Annie Connors in trust for the purposes last aforesaid; deny that thereafter and prior or prior to said sale or ever or at all it was agreed between plaintiff and said defendant, Daniel A. McColgan that for the purpose of securing said defendant, Daniel A. McColgan in the event that he should be made to pay any of the liens alleged to be subsisting against said real property and which or which were not secured by the deed of trust first in said complaint referred to, or for any other purpose, that plaintiff would execute or deliver to said defendant,

Daniel A. McColgan his promissory note in the sum of [81] twenty-four hundred fifty-five (2455) dollars and that or that plaintiff in order to secure the payment of said last mentioned note would execute or deliver to said defendant, Daniel A. McColgan an indenture in writing wherein or whereby he would convey said real property when he had acquired the title thereto or ever or at all to said defendant, Daniel A. McColgan in trust or otherwise, for the purposes referred to in paragraph IV of plaintiff's complaint or for any other purpose but upon or upon the condition that said last mentioned deed of trust would be subject and subordinate to the deed of trust to be delivered to said Annie Connors, as set forth in said complaint, or upon any condition or at all; and deny that said Daniel A. McColgan ever entered into any agreement with said plaintiff referred to in paragraph IV or any other paragraph of plaintiff's complaint.

VII.

Said defendants deny that at any time referred to in paragraph V of plaintiff's complaint, or at any time or at all the plaintiff and said defendant, Daniel A. McColgan entered into any agreement wherein or whereby they agreed that Daniel A. McColgan was to purchase for the use or benefit of plaintiff from said William C. Crittendon all or any of the right, or title or interest of said William C. Crittendon in or to said real property and in or in or to said certificate of sale and to repay or to repay himself for the moneys thus expended by him, out of the moneys coming into his hands from

said trustee at said trustee's sale or otherwise, and said defendants deny that it was also or further agreed or understood or ever or at all agreed or understood by and between plaintiff and said [82] defendant, Daniel A. McColgan, that the sum of ten thousand (10,000) dollars, or any sum would be sufficient to cover the sum which would be expended by defendant, Daniel A. McColgan in the purchase of said judgment and certificate of sale, and said defendants deny that said Daniel A. McColgan ever entered into any such agreement with plaintiff as is set forth in paragraph V of plaintiff's complaint; and said defendants admit that on the 15th day of July, 1914, said Daniel A. McColgan purchased from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property and in and to said certificate of sale but deny that said Daniel A. McColgan so purchased the said real property or any interest therein or said certificate of sale from said William C. Crittendon or any other person in acordance with any agreement or understanding had with plaintiff or for the use or benefit of plaintiff; said defendants deny that in the purchase of said judgment and certificate of sale mentioned or referred to in paragraph V of plaintiff's complaint, or in any part of plaintiff's complaint, said defendant, Daniel A. McColgan well or at all knew that he was acting, and deny that said Daniel A. McColgan was acting therein, in accordance with any agreement with plaintiff to that or any end or in accordance with any agreement with plaintiff

and also or also that said purchase last aforesaid, or any purchase, was made by said defendant, Daniel A. McColgan, for the use or benefit of plaintiff and deny that any purchase referred to in plaintiff's complaint was made by Daniel A. McColgan for the use and benefit of plaintiff. Said defendants have no information or belief upon the subject of lines 4 to 19, inclusive, in paragraph VI of plaintiff's complaint, sufficient to enable them [83] to answer the allegations thereof and placing their denial on that ground said defendants deny that before or after any agreement made or entered into by and between said defendant, Daniel A. McColgan, and plaintiff, or prior to the sale of said real property as set forth in said complaint, or at any time, plaintiff and defendant, R. S. Marshall made or entered into any agreement wherein or whereby it was understood or agreed that said defendant, R. S. Marshall, should attend said sale and purchase thereat for plaintiff the said real property in said complaint described, and should, or should bid thereat the sum of fifteen thousand, four hundred fifty-three (15,453) dollars or thereabouts or any sum for said real property, and deny that it was further or otherwise agreed between the parties last mentioned or any other parties or any persons that said R. S. Marshall and Olive H. Marshall, his wife, or either of them, should make or execute or deliver as and for the act or deed of plaintiff or otherwise and at the special or any instance or request of plaintiff or otherwise the two promissory notes for the respective sums of

thirteen thousand (13,000) dollars and twenty-four hundred fifty-five (2455) dollars, and the payment or the payment of which was to be secured in the manner aforesaid, and deny that either said R. S. Marshall or said Olive H. Marshall, his wife, ever entered into said or any such agreement with plaintiff. Said defendants admit that said R. S. Marshall attended said sale on September 2, 1914, and bid thereat the sum of fourteen thousand (14,000) dollars for said real property and that thereupon said defendant, R. McColgan, as such trustee, sold said real property to said defendant, R. S. Marshall, who bid therefor to said R. McColgan, as trustee, the said sum of fourteen thousand (14,000) dollars, but deny that said R. S. Marshall in so doing [84] was carrying out the or any of the terms of said or any agreement referred to in plaintiff's complaint or that said R. S. Marshall bought said property or that the said property was sold to said R. S. Marshall, or otherwise, in accordance with any understanding or agreement had between said R. S. Marshall and plaintiff as set forth in plaintiff's complaint or otherwise. Deny that said defendant, R. S. Marshall obtained the said sum of fourteen thousand (14,000) dollars, so paid to said defendant, R. McColgan as set forth in said complaint or obtained any sum whatsoever in accordance with any agreement to that or any other end entered into with plaintiff in the manner set forth in plaintiff's complaint or at all. Said defendants have no information or belief upon the subject referred to on page 9 of plaintiff's complaint, liens

7 to 20 thereof, both inclusive, contained in paragraph VI of said complaint, sufficient to enable them to answer *an* placing their denial on that ground said defendants deny that said defendant R. S. Marshall and Olive H. Marshall, his wife, received from Annie Connors at the special instance and request of plaintiff, or otherwise, or at all, the sum of thirteen thousand (13,000) dollars, and deny that said R. S. Marshall and Olive H. Marshall, his wife, or either of them, made, executed or delivered on September 22, 1914, to said Annie Connors the promissory note for thirteen thousand (13,000) dollars, or the deed of trust, or any deed of trust referred to in plaintiff's complaint at the special or any instance or request of plaintiff or in accordance with any agreement to that end made and entered into by or between defendant, R. S. Marshall, or in accordance with any agreement entered into by plaintiff with said R. S. Marshall. [85]

VIII.

Said defendants have no information or belief upon the subject referred to on line 21 to 24, inclusive, on page 9 of plaintiff's complaint, contained in paragraph VI thereof, sufficient to enable them to answer the allegations thereof and placing their denial on that ground they deny that said last mentioned deed of trust was recorded at the time and place stated in plaintiff's complaint or ever or at all. Said defendants have no information or belief upon the subjects referred to in lines 25 to 31, inclusive, on page 9 and in lines 1 to 3, inclusive on

page 10, of said complaint, sufficient to enable them to answer the allegations thereof and placing their denial on that ground said defendants deny that neither said defendant, R. S. Marshall, nor Olive H. Marshall, his wife, ever had any negotiations or dealings with said Annie Connors relative to said loan of thirteen thousand (13,000) dollars and that or that any negotiations or dealings relative to said loan of thirteen thousand (13,000) dollars to said Annie Connors were had or made or entered into by and between said Plaintiff and Annie Connors and that or that said sum of thirteen thousand (13,000) dollars was loaned by said Annie Connors to said defendants, R. S. Marshall and Olive H. Marshall, his wife, or either of them, for the use and benefit of plaintiff and at or at plaintiff's special instance or request or otherwise. Said defendants admit that said R. S. Marshall and Olive H. Marshall, his wife, received from said defendant, Daniel A. McColgan, the said sum of twenty-four hundred fifty-five (2455) dollars but deny that they received said sum of twenty-four hundred fifty-five (2455) dollars or that said Daniel A. McColgan paid said sum in pursuance of the terms of said or any agreement between said plaintiff and said defendant, R. S. Marshall or Olive H. Marshall, his wife, or [86] either of them and deny that said defendant R. S. Marshall, or said defendant, Olive H. Marshall, did on September 2, 1914, or at any other time make or execute or deliver the said promissory note for twenty-four hundred fifty-five (2455) dollars, referred to on page 10 of plaintiff's complaint for the

use or benefit of plaintiff as set forth in said complaint or in pursuance of any agreement made by any persons with plaintiff, and deny that the deed of trust which was executed by said R. S. Marshall and Olive H. Marshall, his wife, to defendants, R. McColgan and Eustace Cullinan in trust for said defendant, Daniel A. McColgan was executed for the use or benefit of said plaintiff, or for the use or benefit of any person other than Daniel A. McColgan, or at the instance or request of said plaintiff, or in pursuance of any agreement made by any person with said plaintiff and said defendants deny that said sum of twenty-four hundred fifty-five (2455) dollars, or any sum, was loaned by said Daniel A. McColgan to said defendants R. *H.* Marshall and Olive H. Marshall, his wife, or either of them, for the use or benefit of plaintiff and at or at plaintiff's special instance or request or otherwise; and said defendants deny that all or any of the several agreements or negotiations or understandings alleged in said complaint to have been had by or between plaintiff and said defendant, R. S. Marshall were at all or any of the times in said complaint mentioned or at any other time fully or at all known to said defendant, Daniel A. McColgan; and deny that any or all of the acts or deeds of said R. S. Marshall and Olive H. Marshall, his wife, as aforesaid, or either of them, were had or taken for the benefit or use of plaintiff and at or at plaintiff's special instance [87] or request or otherwise.

IX.

Deny that said Daniel A. McColgan wholly or at all refused or refuses and declines or declined to render to said plaintiff an account of said sum of fourteen thousand (14,000) dollars and on the contrary said defendant alleges, that while denying the right of plaintiff to any such accounting, he has rendered to plaintiff such an accounting and said defendants admit that said Daniel A. McColgan refused to pay to plaintiff any sum of money whatsoever but deny that any sum of money is due or owing from said Daniel A. McColgan to said plaintiff in accordance with any agreement had to that end by and between plaintiff and defendant, Daniel A. McColgan, or any agreement referred to in plaintiff's complaint, or any agreement at all; and said defendants deny that a large or any amount of said sum of fourteen thousand (14,000) dollars has been retained by said Daniel A. McColgan contrary to or in violation of his or any agreement with plaintiff as set forth in said complaint or otherwise and deny that the amount so retained by said defendant, Daniel A. McColgan can only be ascertained upon an accounting had by said defendant, Daniel A. McColgan, and said defendants deny that there is justly or at all due or owing or unpaid to plaintiff by said defendant, Daniel A. McColgan, as set forth in said complaint or otherwise, considerably more than the said sum of twenty-five hundred fifty-five (2455) dollars, or any sum whatsoever.

X.

Said defendants deny that the value of plaintiff's

equity in said real property is of far or any greater value than the amount alleged to be due to said defendant, Daniel A. McColgan [88] under and in accordance with the terms of said promissory note for twenty-four hundred fifty-five (2455) dollars, and deny that said plaintiff has or at any time since the 15th day of July, 1914, had any equity or interest or right, or title, or estate, whatsoever in or to said real property or any part thereof. Said defendants deny that the defendants can suffer any loss or injury if the proposed sale of said real property is delayed and on the contrary allege that said defendants would suffer great loss and injury if the sale of said real property were delayed, and deny that the plaintiff would suffer irreparable or any injury if said sale heretofore advertised as aforesaid should take place; deny that plaintiff would be without remedy at all if the defendants, R. McColgan and Eustace Cullinan, as such trustees, were permitted to sell the same and deny that plaintiff has no plain, speedy or adequate remedy at law and deny that such sale would injure the plaintiff in any measure or degree.

XI.

Said defendants deny that plaintiff had no knowledge or any means of knowledge of any of said acts or matters referred to in said complaint until one year last past and deny that the acts and matters or any of the acts and matters referred to in plaintiff's complaint were peculiarly within the knowledge of the defendants.

XII.

And further answering the complaint of plaintiff the said defendants, Daniel A. McColgan and R. McColgan and Eustace Cullinan by way of special answer and defense, allege that the alleged cause of action set forth in plaintiff's complaint is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California, and also [89] by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and also by the provisions of subdivisions 1 and 2 of section 337 of the Code of Civil Procedure of the State of California.

And further answering the complaint of plaintiff herein, and as a further and special defense to said action, said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan allege that there was at the commencement of this action and there still *in* another action pending in the Superior Court of the State of California, in and for the County of San Francisco, between the same parties, and for the same cause of action as that in the complaint herein stated and alleged; that said other action so pending in the Superior Court of the State of California, in and for the City and County of San Francisco, is entitled "Fred V. Lineker, Plaintiff, vs. Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall, Olive H. Marshall and Mary J. Tynan, Defendants," and the said action is numbered 75395 on the files of said court.

And further answering the complaint of plaintiff, and as a further and special defense to the above-

entitled action, said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan allege as follows, to wit:

That on or about the 26th day of July, 1916, said Fred V. Lineker, the plaintiff in the above-entitled action, commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, by filing his complaint therein, an action against the defendants, Daniel A. [90] McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall, Olive H. Marshall and Mary J. Tynan; that in his complaint in said action said Fred V. Lineker prayed for an order and decree of the said Superior Court of the State of California, in and for the City and County of San Francisco, enjoining and restraining said defendants, R. McColgan and Eustace Cullinan from selling or causing to be sold under the terms or in pursuance of the provisions of the deed of trust executed to said defendants, R. McColgan and Eustace Cullinan by said defendants, R. S. Marshall and Olive H. Marshall, his wife, and which deed of trust bears date September 2, 1914, the real property described in said deed of trust which real property was the same real property described in the complaint of plaintiff on file herein and in his complaint in said action in the Superior Court of the State of California, in and for the City and County of San Francisco, said plaintiff further prayed that defendant, Daniel A. McColgan be directed to render or set forth an account of all or every sum or sums of money which have come into his hands for or on account of plain-

tiff or for the application thereof and of all dealings and transactions of said defendants, Daniel A. McColgan, in reference to said sum or sums of money which said transactions and sums of money were the same transactions or sums of money referred to in the complaint of plaintiff on file herein, and in his said complaint in said action in the Superior Court of the State of California, in and for the City and County of San Francisco, said plaintiff, Fred V. Lineker, prayed that he have such other and further relief in the premises as to said Court should seem meet and proper; that summons in said action directed to the defendants therein was issued by the Clerk of the said [91] Superior Court of the State of California, in and for the City and County of San Francisco, on the 26th day of July, 1916, and was served on said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan on the 26th day of July, 1916; that on said 26th day of July, 1916, the said Superior Court of the State of California, in and for the City and County of San Francisco, gave, made, entered and issued its restraining order and order to show cause wherein and whereby it was by said Court ordered that until the hearing of said order to show cause and until the further order of said Court the said defendants therein named, to wit, said R. McColgan and said Eustace Cullinan, and each of them, be and they were thereby restrained and enjoined from selling or causing to be sold or taking any further action in relation to the sale of that certain real property described in that certain deed of trust so made by

said R. S. Marshall and Olive H. Marshall, his wife, in trust to said defendants, R. McColgan and Eustace Cullinan, which said deed of trust was recorded in the office of the County Recorder of Stanislaus County in Liber 210 of trust deeds at page 41 thereof, and which said real property was the same real property described in the complaint of plaintiff in the above-entitled action, and by said order said Court further ordered that said defendants and each and all of them appear before said Court, to wit, said Superior Court of the State of California, in and for the City and County of San Francisco, department number 16 thereof, in the courtroom thereof, in the City Hall, in the City and County of San Francisco, State of California, on the 4th day of August, 1916, at the hour of ten o'clock A. M. of said day then and there to show cause, if any they have, why an injunction should not be granted restraining [92] and enjoining said defendants, to wit, R. McColgan and said Eustace Cullinan from selling or causing to be sold or from taking any further action relative to the sale of the real property in said order and in the complaint in said action in the Superior Court of the State of California, in and for the City and County of San Francisco, described, which said real property was as aforesaid the same real property described in the complaint herein; that thereafter, the hearing of said order to show cause was duly and regularly continued by the said Superior Court of the State of California, in and for the City and County of San Francisco, to and until the 25th day

of October, 1916; that on or about the 31st day of August, 1916, the said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan filed in said action then pending in the Superior Court of the State of California, in and for the City of San Francisco, their answer to the complaint of plaintiffs therein; that on said 13th day of October, 1916, the said order to show cause came on duly and regularly for hearing, upon the complaint of plaintiff and the answer of said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan in said action, and evidence thereon was heard by said Court, the plaintiff being then and there represented by his counsel, Milton S. Hamilton, Esq., and the defendants, R. McColgan, Daniel A. McColgan and Eustace Cullinan being then and there represented by their counsel, Messrs. Cullinan & Hickey, and the matter was thereupon submitted to the Court on its merits for decision and thereafter on the 25th day of October, 1916, the said Court gave, made and entered its decision and judgment as follows, to wit: [93]

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

Department No. 16.
In Open Court.
October 25, 1916.
No. 75395.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL McCOLGAN et al.,

Defendants.

This cause having been heretofore submitted to the Court for consideration and decision and the Court having fully considered the same and being fully advised herein, It is ordered by the Court that Plaintiff's motion for an injunction to issue, *pendente lite,* or an order to show cause be and the same is hereby denied. And it is further ordered by the Court that the restraining order now in effect, be and the same is hereby discharged."

That said order, judgment and decision of said Court has become final and that by said judgment, order and decision so given, made and entered by said Superior Court of the State of California, in and for the City and County of San Francisco, the plaintiff herein is barred and estopped from maintaining the above-entitled action in the Superior Court of the State of California, in and for the County of Stanislaus;

WHEREFORE said defendants pray that plaintiff take nothing by his action and that said defendants have judgment against plaintiff for their costs, and that said action be abated and dismissed.

(Signed) CULLINAN & HICKEY,
Attorneys for said Defendants. [94]

State of California,
City and County of San Francisco,—ss.

Daniel A. McColgan, being first duly sworn, deposes and says, that he is one of the defendants in the above-entitled action and makes this affidavit on his own behalf and on behalf of his codefendants, R. McColgan and Eustace Cullinan; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

(Signed) DANIEL A. McCOLGAN.

Subscribed and sworn to before me this 1st day of December, 1916.

[Seal] (Signed) E. J. CASEY,
Notary Public in and for the City and County of San Francisco, State of California. [95]

Exhibit "C."

In the Superior Court of the State of California, in and for the County of Stanislaus.

No. 5344.

Dept. No. 2.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN, R. S. MARSHALL and OLIVE H. MARSHALL, His Wife,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SECOND TRIAL.

The above-entitled action having been duly and regularly set for trial, and coming on regularly for trial on the 13th day of February, 1917, before the above-entitled court, Department No. 2 thereof, Honorable William H. Langdon, Judge thereof, sitting without a jury, the Court, on the motions of defendants, R. S. Marshall and Olive H. Marshall, his wife, and with the consent of plaintiff, dismissed the said action as against said defendants, R. S. Marshall and Olive H. Marshall, his wife, and evidence oral and documentary having been introduced on behalf of the plaintiff, Fred V. Lineker, and on behalf of the defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan, and the action having been submitted

to the Court for its decision, the Court on or about the 2d day of March, 1917, made and filed its Findings of Fact and Conclusions of Law and rendered judgment in favor of the defendants, which judgment was on or about the 2d day of March, 1917, duly entered. Thereafter plaintiff [96] duly made a motion to vacate said judgment and for a new trial of said action, and said Court, on the 7th day of June, 1917, after considering said motion, vacated said judgment theretofore entered in favor of plaintiff and granted a new trial of said action. Thereafter said action came on regularly for such new or second trial thereof and was tried on or about the 20th day of September, 1917, before the said Court, department No. 2 thereof, Honorable William H. Langdon, Judge thereof, sitting without a jury, plaintiff being represented by his counsel, Milton S. Hamilton, Esq., and defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan being represented by Eustace Cullinan, Esq., of Cullinan & Hickey, their attorneys, and said trial having been held on said 20th day of September, 1917, and subsequent days until completed, and evidence having been submitted by all parties and the cause submitted, the Court now makes its Findings of Fact and Conclusions of Law, and finds and concludes as follows, to wit:

FINDINGS OF FACT.

I.

That from the 19th day of November, 1907, down to the 18th day of August, 1913, one Norvena E.

S. Lineker (formerly Norvena E. Svensen) was the owner of that certain real property situate in the County of Stanislaus, State of California, and more particularly described as follows, to wit:

> All that portion of the Northwest quarter of Section Six (6) in Township Four (4) South, Range Nine (9) East, Mount Diablo Base and Meridian, lying North and West of the Paradise Road.

II.

That said real property was on the 6th day of August, [97] 1915, and has been for some time prior thereto, subject to a life interest therein in favor of Ole Svensen; that said Ole Svensen died on the 6th day of August, 1915; that thereafter proceedings were duly had and taken wherein and whereby the life estate of said Ole Svensen was thereby terminated, and the above-entitled Court, in a proceeding regularly had in that behalf, duly made and entered its decree terminating said life estate.

III.

That on the 22d day of September, 1912, Norvena E. Svensen and Fred V. Lineker, plaintiff herein, intermarried, and ever since the said 22d day of September, 1912, they have been and are now husband and wife.

IV.

That on the 18th day of August, 1913, said Norvena E. S. Lineker conveyed said real property by gift deed to plaintiff herein, and said conveyance was recorded in the office of the County Re-

corder of said Stanislaus County, on July 27, 1914, in Volume 193 of Deeds, at page 590 thereof, records of said County of Stanislaus. That on or about the 20th day of June, 1910, and while she was the owner of said real property, the said Norvena E. S. Lineker executed and delivered to defendant, R. McColgan, as trustee for the defendant, Daniel A. McColgan, a deed of trust wherein and whereby the said Norvena E. S. Lineker conveyed and granted the said real property to said R. McColgan, as trustee, to secure the payment by said Norvena E. S. Lineker of a certain promissory note, executed by said Norvena E. S. Lineker to the defendant, Daniel A. McColgan, as payee thereof, for the sum of Twenty-eight hundred fifty dollars ($2850), and to secure the payment also of other sums that should or might be loaned by said Daniel *A.* McColgan to Norvena E. Svensen, and evidenced by the promissory [98] note or notes of Norvena E. Svensen, the said deed of trust was recorded in the office of the County Recorder of the County of Stanislaus, State of California, on the 22d day of April, 1911, in Volume 146 of Deeds, at page 378; and at the time when the said Norvena E. S. Lineker conveyed the said real property to the said plaintiff by deed of gift, as aforesaid, the said real property was subject to the said deed of trust.

V.

That on the 11th day of June, 1913, in an action then pending in the Superior Court of the State of California, in and for the County of Alameda,

one J. A. Williams, plaintiff therein, recovered a judgment against said Norvena E. Svensen, who afterwards became Norvena E. S. Lineker when she married the plaintiff, as aforesaid, which judgment was for the sum of Twelve Hundred Eighty-five Dollars ($1285.00), together with Fifteen ($15.00) Dollars costs; that in said action a writ of execution was issued to the Sheriff of the County of Stanislaus on the 29th day of July, 1913, directing said sheriff of the County of Stanislaus, to satisfy said judgment out of the property of said Norvena E. Svensen; that thereafter, and in pursuance of said writ of execution, A. S. Dingley, as the sheriff of said County of Stanislaus, did, on the 7th day of August, 1913, levy upon the real property, being the same property described herein, and in said deed of trust, and after giving notice as required by law, said sheriff of the County of Stanislaus sold said real property at public auction, in accordance with said writ of execution, and at said sale, which was held on the 30th day of August, 1913, the said Sheriff of said County of Stanislaus sold said real property to one William C. Crittendon, who was the highest bidder thereat, for the sum of Thirteen hundred sixty-one and 20/100 ($1361.20) [99] Dollars, and said Sheriff of said County of Stanislaus on said 30th day of August, 1913, issued to said William C. Crittendon his certificate of said sale, in accordance with the law, and a duplicate of said certificate was duly filed by said Sheriff of said County of Stanislaus in the office of the County Recorder of the County of

Stanislaus, and there recorded on the 3d day of September, 1913, in Volume 3 of Certificates of Sale, at page 81 thereof. That, thereafter, and on the 15th day of July, 1914, said Daniel A. McColgan purchased and acquired from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property, and in and to said certificate of sale, and said William C. Crittendon on the 15th day of July, 1914, executed to said Daniel A. McColgan, and instrument in writing whereby said William C. Crittendon granted, sold and assigned to said Daniel A. McColgan the said certificate of sale, and all the right, title and interest of said William C. Crittendon in and to said certificate of sale, and in and to said real property therein described; that said instrument in writing so executed by William C. Crittendon, to said defendant, Daniel A. McColgan, was recorded in the office of the County Recorder of said County of Stanislaus at seventeen minutes past one o'clock P. M., on the 2d day of September, 1914, in Volume 3 of Miscellaneious, at page 343 thereof. That thereafter, and on the said 2d day of September, 1914, the said *W.* S. Dingley, as Sheriff of said County of Stanislaus, executed to said Daniel A. McColgan, in accordance with the law, his deed reciting the facts of the issuance of said writ of execution, the sale thereunder, the issuance of his certificate of sale to said William C. Crittendon as aforesaid, the assignment by said William C. Crittendon to said Daniel A.

[100] McColgan, as aforesaid, and granting, in accordance with the law, and in pursuance of the statute in such cases made and provided, to said Daniel A. McColgan all the right, title and interest and claim which said judgment debtor, Norvena E. Svensen, had, at the time of the levy of said writ of execution, as aforesaid, or on the said 2d day of September, 1914, had in or to said land; and said deed from said Sheriff to said Daniel A. McColgan was recorded in the office of the County Recorder of said County of Stanislaus at thirteen minutes past two o'clock, P. M. on the 2d day of September, 1914, in Volume 207 of Deeds at page 143 thereof.

VI.

That said Daniel A. McColgan purchased and acquired from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property, and in and to said certificate of sale for his own use and benefit, and with his own money; that said Daniel A. McColgan did not purchase or acquire the said right, title and interest of said William C. Crittendon in and to said real property, or in and to said certificate of sale, for the use or benefit of said plaintiff or of any person except himself, said Daniel A. McColgan, and did not purchase or acquire said interest of said William C. Crittendon in or to said certificate of sale or said real property, and did not receive said deed from said Sheriff in pursuance of any agreement whereby the said Daniel A. McColgan, either prior or subsequent

to the purchase of said certificate, agreed with said plaintiff or with any other person that said Daniel A. McColgan was to purchase for the use or benefit of plaintiff or of any other person, from said William C. Crittendon all or any of the [101] right, title or interest of said William C. Crittendon in and to said real property or in and to said certificate of sale; that said Daniel A. McColgan never entered into any agreement with plaintiff or any other person wherein or whereby said Daniel A. McColgan agreed that he was to purchase, for the use or benefit of plaintiff from William C. Crittendon all the right, title or interest of said William C. Crittendon in or to said real property, or in or to said certificate of sale; that said Daniel A. McColgan never entered into an agreement with plaintiff or any other person wherein or whereby said Daniel A. McColgan agreed that he was to purchase from said William C. Crittendon for the use and benefit of plaintiff or otherwise, all or any of the right or title of said William C. Crittendon in or to said real property or in or to said certificate of sale, or to repay himself for the moneys thus expended by him out of the moneys coming into his hands from any trustee at any trustee's sale, and it was never agreed or understood by or between plaintiff and said Daniel A. McColgan or by or between said Daniel A. McColgan or any other person that the sum of ten thousand ($10,000) Dollars, referred to in plaintiff's complaint, or any other sum would be sufficient to cover the sum which

would be expended by defendant, Daniel A. McColgan in the purchase of said judgment and certificate of sale; that all the allegations in plaintiff's complaint to the effect that Daniel A. McColgan made any agreement with plaintiff or any other person to purchase from said William C. Crittendon all or any of the title or interest of said William C. Crittendon in and to said real property and in and to said certificate of sale for the use and benefit of plaintiff, are, and each of them is untrue; and said Daniel A. McColgan did not purchase or acquire any of the right or title or interest of said William C. Crittendon [102] in or to said real property, or in or to said certificate of sale, in accordance with any agreement or understanding had with the plaintiff, but he purchased the same for his own exclusive use and benefit.

VII.

That on or about the 23d day of April, 1914, said R. McColgan, as the trustee named in said deed of trust, gave notice, and caused notice to be given, in accordance with the terms of said deed of trust, that he would on May 25, 1914, sell at public auction, at a time and place set forth in said notice, the property described in said deed of trust, being the same property herein described, and that said sale was thereafter postponed from time to time, as provided in said deed of trust, and at the request of plaintiff, from the 25th day of May, 1914, to the 2d day of September, 1914, and on said 2d day of September, 1914, at 3 o'clock P. M. on said day said real property was sold by R. McColgan, as

the trustee named in said deed of trust, under and in accordance with the provisions of said deed of trust, and at said sale, the said real property was sold by said R. McColgan, as such trustee, to one R. S. Marshall, defendant herein; that said sale was not made, pursuant to any agreement between said plaintiff and said defendant, Daniel A. McColgan, whether set forth in the complaint of plaintiff on file herein or otherwise.

VIII.

That on and prior to the 2d day of September, 1914, the said real property was subject to certain liens and encumbrances as follows, to wit:

An attachment levied May 21, 1912, in an action then and now pending in the Superior Court of the State of California, in and [103] for the County of Stanislaus, entitled "Farmers and Merchants Bank, a corporation, vs. Norvena E. Svensen and Mary J. Tynan," which attachment was for One Thousand and Forty-seven and 75/100 ($1,047.75) Dollars, with interest at the rate of eight (8%) per cent from the 14th day of July, 1911, interest to be compounded semi-annually.

Attachment levied on the —— day of ——, 191—, in an action then and now pending in the ——, National Bank of Modesto, a Corporation, Plaintiff, vs. Norvena E. Lineker and Fred V. Lineker, Defendants, which attachment was for One Hundred and Ninety-three and 34/100 ($193.34) Dollars.

Attachment levied November 6, 1912, in an action then pending in the Superior Court of the State of California, in and for the County of Stanislaus

entitled "Mary J. Tynan, Plaintiff, vs. Norvena E. Lineker (formerly Norvena E. Svensen), Defendant" which attachment was on the 4th day of August, 1914, reduced to judgment, in favor of the plaintiff for the sum of One Thousand Two Hundred and Sixty-four and 91/100 ($1,264.91) Dollars, with interest thereon at the rate of seven (7%) per cent per annum.

The claims which were secured by said attachments in favor of said First National Bank of Modesto and said Farmers and Merchants Bank, a corporation, and by said attachment and judgment in favor of said Mary J. Tynan, respectively, have never been satisfied or discharged.

IX.

That until the 2d day of September, 1914, said Fred V. Lineker did not have sufficient money to enable him to purchase said real property at said sale so to be held under said deed of trust [104] *of trust;* that it was apparent to said Fred V. Lineker, on and prior to the 2d day of September, 1914, that it would be necessary for him in order to purchase said real property at said sale under said deed of trust to bid in said real property for a sum not less than Fourteen Thousand ($14,000) Dollars, in order to prevent said real property from being purchased at said trustee's sale by some one of the said persons who had had said real property attached as aforesaid; that said Fred V. Lineker and one R. S. Marshall, on or about said 2d day of September, 1914, and prior to said sale under said deed of trust, made and entered into an agreement

wherein and whereby it was understood and agreed that R. S. Marshall should attend said sale under said deed of trust and purchase thereat for said Fred V. Lineker the said real property and should bid in the said real property for the sum of Fourteen Thousand ($14,000.00) Dollars at said sale; that in order to obtain said sum of Fourteen Thousand ($14,000.00) Dollars it was further agreed between said Fred V. Lineker and R. S. Marshall at the same time, that the said R. S. Marshall and Olive H. Marshall his wife, should borrow from Annie Connors the sum of Thirteen Thousand ($13,000.00) Dollars and execute to said Annie Connors their promissory note for the sum of Thirteen Thousand ($13,000.00) Dollars so borrowed and interest thereon, and should also execute to M. J. Connors and B. M. Lyon as trustees, for said Annie Connors, their deed of trust conveying to said M. J. Connors and B. M. Lyon as such trustees, the said real property to secure the payment of said promissory note for Thirteen Thousand ($13,000.00) Dollars so executed by said R. S. Marshall and Olive H. Marshall, his wife, to said Annie Connors; and it was further agreed that said R. S. Marshall and Olive H. Marshall, his wife, in order to obtain the additional One Thousand ($1,000) Dollars necessary for the [105] purchase of said land at said trustee's sale as aforesaid, and in order to obtain Four Hundred and Fifty-five ($455.00) Dollars to pay said Annie Connors as and for Six (6) months interest in advance on said note for Thirteen Thousand ($13,000.00) Dollars, and in order to obtain an ad-

ditional sum of One Thousand ($1,000) Dollars for said Fred V. Lineker, should borrow the sum of Two Thousand Four Hundred and Fifty-five ($2,-455.00) Dollars from said Daniel A. McColgan and should execute to said Daniel A. McColgan their promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars and interest, and to secure the payment of said promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars and interest, should execute to R. McColgan and Eustace Cullinan as trustees for said Daniel A. McColgan their deed of trust (which deed of trust should be subordinate and subsequent to said deed of trust so given to secure the payment of said note to Annie Connors), and which deed of trust should convey to R. McColgan and Eustace Cullinan as such trustees, the said real property as security for the payment of said note for Two Thousand Four Hundred and Fifty-five to said Daniel A. McColgan; and in pursuance of such agreement between said R. S. Marshall and said Fred V. Lineker, the said R. S. Marshall did attend the said sale on August 2d, 1914, and did bid thereat the sum of Fourteen Thousand ($14,000.00) Dollars for said real property, and thereupon said R. McColgan as the trustee in said deed of trust dated June 20, 1910, sold said real property to R. S. Marshall who paid therefor to R. McColgan the said sum of Fourteen Thousand ($14,000.00) Dollars and said R. S. Marshall and Olive H. Marshall, his wife, did, thereupon, in accordance with said understanding and agreement

between R. S. Marshall and said Fred V. Lineker as aforesaid, borrow the said sum of Thirteen [106] Thousand ($13,000.00) Dollars from said Annie Connors and execute to said Annie Connors their promissory note for Thirteen Thousand ($13,-000.00) Dollars as aforesaid, and their said deed of trust conveying said land to M. J. Connors and B. M. Lyon trustees for said Annie Connors as aforesaid, and did also borrow and receive said sum of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars from said Daniel A. McColgan, and did execute to said Daniel A. McColgan their promissory note for the said sum of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars and interest thereon, and did execute to said Daniel A. McColgan their deed of trust conveying said land to R. McColgan and Eustace Cullinan as trustees for said Daniel A. McColgan to secure the payment of said promissory note to said Daniel A. McCol-gan for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars; and said R. S. Marshall out of the said Thirteen Thousand ($13,000.00) Dollars so borrowed from Annie Connors, and the said sum of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars so borrowed of Daniel A. McColgan did pay the said sum of Fourteen Thou-sand ($14,000.00) Dollars the purchase price of said land to said R. McColgan as trustee under said deed of trust dated June 20, 1910, did pay the said Annie Conners the sum of Four Hundred and Fifty-five (455.00) Dollars interest on said note for Thirteen Thousand ($13,000.00) Dollars, and did pay to said

Fred V. Lineker the remaining One Thousand ($1,-000.00) Dollars for the use and benefit of said Fred V. Lineker; and said R. S. Marshall in and about said transactions acted as the agent and representative of said Fred V. Lineker; the said deed of trust so executed to M. J. Connors and B. M. Lyon as trustees for said Annie Connors and the promissory note secured thereby was so executed on the 2d day of September, 1914, and said deed [107] of trust was recorded in the office of the County Recorder of the County of Stanislaus on September 3, 1914, in Volume 198 of Trust Deeds at page 634 thereof, and said deed of trust to R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan and the promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars and interest secured thereby, were also dated September 2, 1914, and said deed of trust to R. McColgan and Eustace Cullinan was recorded on the 3d day of September, 1914, in Liber 210 of Trust Deeds at page 41 thereof in the office of the County Recorder of said County of Stanislaus.

That neither said R. S. Marshall nor Olive H. Marshall, his wife, ever had any negotiations with said Daniel A. McColgan relative to said loan of Two Thousand Four Hundred and Fifty-five ($2,-455.00) Dollars and that all negotiations and dealings relative to said loan of Two Thousand Four Hundred and Fifty-five ($2.455.00) of said Daniel A. McColgan were had and taken by and between plaintiff and said Daniel A. McColgan, and that the said sum of Two Thousand Four Hundred and

Fifty-five ($2,455.00) Dollars was loaned by said Daniel A. McColgan to the said R. S. Marshall and Olive H. Marshall, his wife, for the use and benefit of plaintiff, and at plaintiff's special instance and request.

X.

That the execution, on the 2d day of September, 1914, by R. S. Marshall and Olive H. Marshall, his wife, as the agent and representative of said Fred V. Lineker to said Daniel A. McColgan, of said promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars, was intended by said Fred V. Lineker and by said Daniel A. McColgan to be, and was in fact an account stated between said Fred V. Lineker and Daniel A. McColgan, and was intended to be, and was in fact a final accounting between said [108] Fred V. Lineker and said Daniel A. McColgan of all debts and financial transactions between them up to the time of said execution of said promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars, and by directing R. S. Marshall and Olive H. Marshall, his wife, as his agents to execute to said Daniel A. McColgan said promissory not for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars, the said Fred V. Lineker intended to and did in fact acknowledge and agree that there was on said 2d day of September, 1914, and after said sale under said deed of trust dated June 20, 1910, a balance of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars due from said Fred V. Lineker to Daniel A. McColgan.

XI.

That neither before nor after notice of said sale under said deed of trust dated June 20, 1910, had been given by said R. McColgan, as such trustee, and neither prior nor subsequent to the sale of said real property by said trustee, did plaintiff and defendant, Daniel A. McColgan, or Daniel A. McColgan make or enter into any agreement wherein or whereby plaintiff and defendant, Daniel A. McColgan, or R. McColgan agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount, to pay the amount said defendant, Daniel A. McColgan claimed to be due him from said Norvena E. S. Lineker, or any other lien subsisting against said real property not secured by said deed of trust, and no such or similar agreement was made by Daniel A. McColgan with said plaintiff or any other person; that the said Daniel A. McColgan did not at any time inform said plaintiff that the said real property should be sold for the sum of Ten Thousand ($10,000.00) Dollars, and did not at any time inform said plaintiff that the said sum of [109] Ten Thousand ($10,000.00) Dollars would be sufficient to pay the amount claimed to be due him by Norvena E. S. Lineker, including the expenses of said sale, and any other liens not secured by said deed of trust; and said plaintiff and said defendant, Daniel A. McColgan did not, at any time, agree that plaintiff would bid the sum of Ten Thousand ($10,000.00) Dollars for said real property at said sale, either upon the understanding or agreement or otherwise

of said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last named defendant from said trustee, in the manner referred to in the complaint of plaintiff on file herein, said Daniel A. McColgan would not pay or cause to be paid any lien until the same had been judicially determined to be a valid and subsisting lien against said real property or upon the further or any understanding that said defendant, Daniel A. McColgan would account to plaintiff for any or all moneys coming to his hands as the proceeds of said sale; that said Daniel A. McColgan never agreed to account to plaintiff for any moneys coming into his hands as the proceeds of the said sale.

XII.

That neither prior nor subsequent to the said sale, under the said deed of trust dated June 20, 1910, was it agreed between plaintiff and said defendant, Daniel A. McColgan, or was it agreed by said Daniel A. McColgan that for the purpose of securing said Daniel A. McColgan, in the event that he should be made to pay any liens alleged to be subsisting against said real property and which were not secured by said deed of trust, plaintiff would execute and deliver to Daniel A. McColgan his promissory note for twenty-four hundred fifty-five ($2455.00) Dollars, or that plaintiff, in order to secure the payment of said [110] last mentioned note, would execute and deliver to said defendant, Daniel A. McColgan an indenture in writing wherein and whereby he would convey said real property, when he had acquired the title thereto,

to said defendant, Daniel A. McColgan, in trust, for any purpose.

XIII.

That the said real property was sold on the said 2d day of September, 1914, by said trustee, and at said sale, to said R. S. Marshall for the sum of Fourteen Thousand ($14,000.00) Dollars; that said R. S. Marshall paid therefore the said sum of Fourteen Thousand ($14,000.00) Dollars to said R. McColgan, as such trustee, but that said real property was not sold to or purchased by said R. S. Marshall in accordance with any agreement or understanding between said R. S. Marshall and defendants, Daniel A. McColgan or R. McColgan, or between plaintiff and said Daniel A. McColgan or R. McColgan; that said sum of Fourteen Thousand ($14,000.00) Dollars was paid by said R. S. Marshall to said R. McColgan, as such trustee, on the said 2d day of September, 1914, and was thereupon delivered and paid over to said defendant, Daniel A. McColgan, by said R. McColgan, said defendant, as such trustee; that on said 2d day of September, 1914, at the time of said sale, the said Daniel A. McColgan was the owner of said real property.

XIV.

That said plaintiff has demanded of said defendant, Daniel A. McColgan, that he render an account of said sum of Fourteen Thousand ($14,000.00) Dollars so paid to him by said R. McColgan, as such trustee, and said Daniel *R.* McColgan has refused to render [111] any account of said Fourteen

Thousand ($14,000.00) Dollars to plaintiff, or to pay any portion thereof to plaintiff.

XV.

That all the allegations in paragraph X of said plaintiff's complaint are, and each of them, is untrue and that plaintiff has had since the 2d day of September, 1914, full and complete knowledge of all the facts and transactions referred to in plaintiff's complaint.

XVI.

That the alleged cause of action set forth in plaintiff's complaint is not barred by the provisions of Subdivision 1, Sec. 329 of the Code of Civil Procedure of the State of California.

XVII.

That there was not at the time of the commencement of this action any other action pending between said plaintiff, or any of the defendants herein for the same cause, and that none of the issues of fact or of law involved in this action has been heretofore adjudicated in any action between plaintiff and any of the defendants herein.

CONCLUSIONS OF LAW.

And as Conclusions of Law from the foregoing facts, the Court finds:

I.

That at the time of said sale of said real property by said trustee on said 2d day of September, 1914, which sale was had as aforesaid under said deed of trust dated June 20, 1910, said Daniel A. McColgan was the owner of the real property described [112] in said deed of trust, and in said complaint on file herein and was the successor to, and the owner

of all the right, title and interest therein, which said Norvena E. S. Lineker had, or owned therein at the time of the execution of said deed of trust, or on the 7th day of August, 1913.

II.

That on the 2d day of September, 1914, at the time of said sale of said real property by said trustee as aforesaid, said Daniel A. McColgan was, and he is still entitled to any and all proceeds of said sale of said real property by said R. McColgan as aforesaid, named in said deed of trust, dated June 20, 1910, over and above the debts and obligations that were secured by said deed of trust.

III.

That on said 2d day of September, 1914, at the time of said sale by R. McColgan, the trustee under said deed of trust, dated June 20, 1910, of said real property, the said Fred V. Lineker was not the owner of said real property, or any interest therein, and was not entitled to any surplus, or any portion of any surplus that remained in the hands of R. McColgan as such trustee, as the proceeds of said sale of said real property by said trustee, after the payment of the debts secured by said deed of trust dated June 20, 1910.

IV.

That on the 2d day of September, 1914, an account was stated between said Fred V. Lineker and said Daniel A. McColgan of all transactions between said Fred V. Lineker and said Daniel A. McColgan referred to in the complaint of plaintiff and filed herein as having occurred prior to the

2d day of September, 1914, and in said account stated it was agreed by and between said [113] Daniel A. McColgan and said Fred V. Lineker that there was then on the 2d day of September, 1914, and after said sale so held on said date under said deed of trust dated June 20, 1910, a balance of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars due to said Daniel A. McColgan from said Fred V. Lineker.

V.

That said Fred V. Lineker, the plaintiff, is not entitled to a judgment against any of said defendants herein for an accounting of the proceeds of said sale of said real property made by said R. McColgan as such trustee under said deed of trust dated June 20, 1910, as aforesaid, or of any of the dealings or transactions of said defendants, Daniel A. McColgan, or R. McColgan and Eustace Cullinan, referred to in the complaint of plaintiff herein; that plaintiff is not entitled to any relief whatsoever against any of said defendants.

VI.

That defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan are entitled to judgment against the plaintiff for their costs of suit.

Let judgment be entered accordingly.

Dated, April 30, 1918.

W. H. LANGDON,
Judge. [114]

Exhibit "D."

In the Superior Court of the State of California, in and for the County of Stanislaus.

No. 5344.

Dept. No. 2.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN, R. S. MARSHALL, and OLIVE H. MARSHALL, His Wife,

Defendants.

JUDGMENT.

(After Second Trial.)

The above-entitled action having been submitted to the Court for its decision and the Court having made and filed its findings of fact and conclusions of law, now orders, adjudges and decrees as follows, to wit:

That plaintiff is not entitled to the relief prayed for in his complaint or to any relief against the defendants, or any of them, and that defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan are entitled to judgment against plaintiff for their costs of suit amounting to ——— Dollars.

Done in open court this 30th day of April, 1918.

W. H. LANGDON,

Judge.

[Endorsed]: Filed Mar. 29, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [115]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly Mary J. Tynan), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased, (Submitted in the Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Affidavit of the Defendant Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, Deceased.

City and County of San Francisco,
State of California,
Northern District of California,—ss.

Adelaide McColgan, being first duly sworn, deposes and says: That she is one of the defendants in the above-entitled action or suit; that affiant is the administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and as such administratrix is one of the defendants in said action or suit; that the above-entitled action or suit was commenced during the lifetime of said Daniel A. McColgan and that said Daniel [116] A. McColgan died on May 12th, 1921, and since the filing of the bill of complaint in the office of the Clerk of the above-entitled court; that by an order of the above-entitled court, affiant, as the administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, was substituted in the place and stead of said Daniel A. McColgan, deceased; that Honorable William C. Van Fleet, before whom the above-entitled action is to be tried, has a personal bias or prejudice against affiant and in favor of the plaintiff Norvena Lineker; that said Honorable William C. Van Fleet has a personal prejudice against affiant, *that said Honorable William C. Van Fleet has a personal bias against affiant;* that said Honorable William C. Van Fleet has a personal bias in favor of the above-named plaintiff

Norvena Lineker; that the facts and the reasons for the belief of affiant that such bias and prejudice exists are as follows: That in the month of October, in the year 1919, there was tried before said Honorable William C. Van Fleet, sitting as Judge of the above-entitled court, an action at law in which the plaintiffs herein were plaintiffs and Mary J. Dillon and Thomas B. Dillon were defendants; that neither Daniel A. McColgan nor the defendant R. McColgan, nor any of the defendants herein, other than Mary J. Dillon, were parties or privies to said action at law; that said Daniel A. McColgan was a witness in said action at law and gave testimony at the trial thereof; that the trial of the above-entitled action (viz., the action or suit of Norvena Lineker, et al., against R. S. Marshall, et al.), was commenced in the above-entitled court before said Honorable William C. Van Fleet on the 20th day of January, 1922; that when said trial began the defendants asked permission of the Court to introduce evidence in support of the defendants' pleas of former adjudications of the controversy involved in the [117] above-entitled action before the plaintiffs should be permitted to offer evidence in support of the allegations of the bill of complaint; that such permission was granted by the Court, and the defendants thereupon introduced in evidence the judgment and judgment roll in an action pending in the Superior Court of the State of California, in and for the County of *Calaveras,* entitled Frederick V. Lineker, plaintiff, against Daniel A. McColgan, R. McColgan, Eustace Culli-

nan, R. S. Marshall and Olive H. Marshall, his wife, defendants, and the judgment and judgment-roll in an action pending in said Superior Court entitled R. S. Marshall and Olive H. Marshall, plaintiffs, against Daniel A. McColgan, R. McColgan, and Eustace Cullinan, defendants; that pursuant to such permission the defendants also introduced in evidence the *remittitur* of the District Court of Appeal, for the Third Appellate District, affirming the judgment in said first mentioned action and also introduced in evidence certain briefs filed in said action in the said Superior Court and in the said District Court of Appeal; that the foregoing was all the evidence introduced by any of the parties to this action; that after the introduction of such evidence in support of said pleas of former adjudications, counsel for defendants and counsel for plaintiffs argued the question of law as to whether such judgment supported said pleas of former adjudications; that said argument was made on the 24th day of January, 1922; that at the conclusion of said argument and on said 24th day of January, 1922, said Honorable William C. Van Fleet made the following statements from the bench, viz.:

The COURT.—I am satisfied from the impression made upon my mind by this argument, to which I have listened with a great deal of interest, that I would not be justified in [118] proceeding at this time to the trial of the case on the merits. I want to examine this question for myself in the light of the authorities and in the light of the plead-

ings in the former cases, in the State Court; but I am very strongly impressed with the fact that the contention is well taken. Mr. Taugher, I have heard you through now?

Mr. TAUGHER.—I was going to ask you a question.

The COURT.—Ask the question. What is it?

Mr. TAUGHER.—I was going to say, if your Honor would like to have them, that there are various points upon which I can supply authorities if your Honor would give me permission.

The COURT.—Oh, you ought to know that I never decide anything blindly when I can have information from either side. But the question, the principles involved in the doctrine of *res adjudicata* are very well settled and they do not proceed along the narrow lines that it seems to me counsel for plaintiffs would be inclined to desire to confine them. It is not a question of whether or not in all of its refinements the same precise matters have been litigated in their fullness in one case,—if they occur in another case and if the essential principles involved in the case at hand has in another action been adjudicated and under pleadings where the same substantive grounds may have or might have been adjudicated, although even not in their fullness, yet if the party had the opportunity in an action involving the same substantive rights to have those facts adjudicated and the judgment is in fact adjudicated on principles there presented, he cannot have another day [119] in court to re-litigate those fundamental principles.

Mr. TAUGHER.—Yes.

The COURT.—Now then, I am only suggesting this, of course, in a tentative way, because I am fully satisfied myself that this defense is not well taken, and I will be perfectly frank to say, because I have become so familiar with the facts underlying this whole transaction with reference to this woman's property, that it is a stench in the nostrils of any honest man, the manner in which this woman's property was taken from her originally. It was little less than downright robbery. And I have stated it before in the presence of those who are responsible, and I again insist upon it, that the evidence that they may have given in the past in courts of justice under certain circumstances, does not change my attitude at all, because in the case of Mrs. Lineker against Dillon and in the subsequent contempt proceedings the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion which should be based upon them; and therefore I desire if possible to reach the merits of this controversy. The character in which that occurred was brought out, was well illustrated, well evidenced upon the stand by one of the McColgans—I don't know whether it is the one that is still alive or the one that is dead—

Mr. TAUGHER.—He is dead.

The COURT.—Where he voluntarily made the suggestion that he felt—I don't remember exactly how he expressed it—but undoubtedly it was on his conscience that he had felt that perhaps there was

something coming to Mrs. Lineker [120] and that he had had that in mind to come to a settlement with her, although he said he had not.

Mr. TAUGHER.—Yes, your Honor—offered settlement with her for several thousand dollars.

The COURT.—Yes, I have forgotten. But underlying that declaration, which was forced from him undoubtedly by his conscience, was this history of a state of facts that should make any honest man blush. Therefore I say that if I can get away from this technical objection—technical in the sense that it does not involve the merits—I shall do so; but I frankly say to you now that I cannot see my way clear upon the presentation that has been had here, and it has been a very thorough one, of avoiding the objection that has been made here.

Mr. TAUGHER.—May we make a suggestion?

The COURT.—Mr. Taugher, what is your suggestion? I don't like to be interrupted or to be bombarded with questions after I have given my ruling.

Mr. TAUGHER.—Pardon me.

The COURT.—What is it you wish to suggest?

Mr. TAUGHER.—I was going to say that if after your Honor reads those pleadings and you are still not satisfied, if your Honor will give me permission then to write a little brief on the matter I will be glad to do it.

The COURT.—I don't believe for a moment, with the presentation that has been made here, that there will be any room for any further light to be cast upon it by counsel. I just want to look at these

pleadings for myself and I believe that with my experience in the construction of pleadings that I will be just as well satisfied with my [121] own construction as I would with the construction of counsel, when I decide. But, as I say, I am satisfied that I would not feel justified to go on with the merits of this case until this question has been definitely settled, because of my very strong view that it would not be possible to do so with the strong conviction I now have that the judgment—that the defense will have to be sustained. Now, of course, counsel at the bar is not responsible for this; I don't know who has been responsible; but this woman's rights have been butchered in the past, and in my judgment she had a fine property there and it has been gotten away from her. Happily for her she was enabled, through the efforts of one of the counsel in this case, to recover a very considerable quantity of her property that had been, or its equivalent, taken from her. But that this property to-day is worth a great *deal than* has been recovered back to her I do not doubt.

Mr. TAUGHER.—Worth a hundred thousand dollars.

Mr. PARTRIDGE.—What nonsense.

The COURT.—I will continue the case on the merits until I have been able to examine those questions for myself, with the hope, as I say, that I may be able to avoid this defense, but with the fear that I shall not be able to.

Mr. HARWOOD.—Has your Honor any objec-

tion to my handing you a memorandum on that matter containing the authorities?

The COURT.—No, sir, I don't wish any memorandum. I do not wish you to be heard in any further way than you have been. [122]

Mr. HARWOOD.—I have handed counsel here this.

The COURT.—Well, hand it to the clerk—are you asking to file something?

Mr. HARWOOD.—No, that is the only idea I had.

The COURT.—Oh, yes, I am willing for you to offer anything that has been presented here.

Mr. TAUGHER.—I did not file any authorities. If you care to have me I will do so.

The COURT.—I think it might be well to have this argument written out. Have you been taking down this whole thing (Addressing the Reporter)?

The REPORTER.—Yes, and with the assistance of the documents and pleadings I can transcribe it.

The COURT.—I don't care anything about that. Give me the citations. The case on the merits is continued indefinitely until I have had opportunity to go into this matter. Is there anything else. This stands submitted on the feature of the defense, the question of *res adjudicata.*"

That the foregoing statements made by said Honorable William C. Van Fleet were taken down in shorthand by the official stenographic reporter of said court; that said Honorable William C. Van Fleet is designated in the foregoing statement by the words "The Court"; that at the time the fore-

going statements were made by said Honorable William C. Van Fleet no evidence had been offered or received in support of any of the issues in the above-entitled action except in support of the issues raised by the defendants' affirmative pleas of former adjudications; that said Honorable William C. Van Fleet believes that said Daniel A. McColgan robbed the said plaintiff Norvena Lineker and believes that said Daniel A. McColgan was a dishonest and unscrupulous man; that such belief on the part of [123] said Honorable William C. Van Fleet is not based upon any evidence received in any action or proceeding in which said Daniel A. McColgan was a party or to which said Daniel A. McColgan was privy, and is not based on any evidence received or introduced in the above-entitled action or suit; that if said Honorable William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on the part of said Honorable William C. Van Fleet will prevent said Honorable William C. Van Fleet from determining such issues with impartiality; that said Honorable William C. Van Fleet believes that said plaintiff Norvena Lineker was grievously wronged by said Daniel A. McColgan in the transaction described in the bill of complaint herein; that such belief on the part of said Honorable William C. Van Fleet is not based on any evidence received in any action or proceeding in which said Daniel A. McColgan was a party, or to which he was privy, and is not based on any evidence received in the above-entitled action or suit; that if said William C.

Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on his part will prevent him from determining such issues with impartiality; that said Daniel A. McColgan was not in fact dishonest or unscrupulous; that said Daniel A. McColgan never robbed, or defrauded, or took any undue advantage of said plaintiff Norvena Lineker, or of any other person; that said plaintiff Norvena Lineker was never wronged or defrauded by said Daniel A. McColgan, and that in all transactions between said Daniel A. McColgan and said Norvena Lineker, said Daniel A. McColgan acted honestly and with good faith; that the reasons why this affidavit was not filed not less than ten days before the beginning of the term of the above-entitled court are as follows: That affiant did not at any time prior to the 24th day of January, 1922, [124] know that said Honorable William C. Van Fleet had a personal prejudice or bias against affiant or a personal prejudice or bias in favor of said plaintiff Norvena Lineker; that on said 24th day of January, 1922, the said Honorable William C. Van Fleet ordered that the trial of the above-entitled action or suit be continued indefinitely until said Honorable William C. Van Fleet had an opportunity to determine the sufficiency of said pleas of former adjudications, and at the time of making said order, said Honorable William C. Van Fleet stated that he would try no cases at San Francisco until after the month of March as he would be engaged during the month of March in trying cases at the City of Sacramento; that the official steno-

graphic reporter who took down the said statements of said Honorable William C. Van Fleet, as aforesaid, was not the regular stenographic reporter of said court, but was merely acting as such reporter on the 24th day of January, 1922, in the place of the regular stenographic reporter; that the stenographic reporter took down said statements in shorthand as aforesaid is named W. L. Flannery and is regularly employed as a stenographic reporter by the Railroad Commission of the State of California; that after the 24th day of January, 1922, Alfred J. Harwood, affiant's counsel herein, made diligent effort to communicate with said W. L. Flannery and on several occasions called at the office of the said Railroad Commission to see said W. L. Flannery, so that he would request said W. L. Flannery to transcribe his notes taken on the said 24th day of January, 1922, but affiant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California, acting as official stenographic reporter for the said Railroad Commission at hearings held at Eureka and said other places; that affiant's said counsel used reasonable [125] diligence in making such request of said W. L. Flannery and used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922, as aforesaid; that affiant's said counsel was unable to obtain a transcript of said notes until the last week in the month of February, 1922; that on the said 24th day of January, 1924,

said Honorable William C. Van Fleet did not continue the trial of the above-entitled action or suit to any definite day or term of said court, but continued the trial thereof indefinitely; that the time for the trial of said action or suit has not yet been set.

WHEREFORE, affiant, the said defendant, prays that the Honorable William C. Van Fleet proceed no further in the above-entitled action, but another Judge shall be designated in the manner prescribed in Section 20 of the Judicial Code, or chosen in the manner prescribed in Section 23 thereof, to hear such matter.

ADELAIDE McCOLGAN.

Subscribed and sworn to before me this 16th day of March, 1922.

[Seal] E. J. CASEY,

Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL OF RECORD.

I, the undersigned, Alfred J. Harwood, counsel of record for the above-named defendant Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, do hereby certify that the foregoing affidavit and application are made in good faith.

ALFRED J. HARWOOD,
Counsel of Record for said Defendant.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in the Place and Stead of said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Affidavit of the Defendant R. McColgan.

City and County of San Francisco,
State of California,
Northern District of California,—ss.

R. McColgan, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action or suit; that Honorable William C. Van Fleet, before whom the above-entitled action

is to be tried, has a personal bias or prejudice against affiant and in favor of the plaintiff Norvena Lineker; that said Honorable William C. Van Fleet has a personal prejudice against affiant; that said Honorable William C. Van Fleet has a personal bias against affiant; that said Honorable William C. Van Fleet has a personal bias in favor of the above-named plaintiff [127] Norvena Lineker; that the facts and the reasons for the belief of affiant that such bias and prejudice exists are as follows: That in the month of October, in the year 1919, there was tried before said Honorable William C. Van Fleet, sitting as Judge of the above-entitled court, an action at law in which the plaintiffs herein were plaintiffs and Mary J. Dillon and Thomas B. Dillon were defendants; that neither affiant nor the defendant Daniel A. McColgan, nor any of the defendants herein, other than Mary J. Dillon, were parties or privies to said action at law; that said defendant Daniel A. McColgan was a witness in said action at law and gave testimony at the trial thereof; that the trial of the above-entitled action or suit (viz., the action or suit of Norvena Lineker et al., against R. S. Marshall, et al.), was commenced in the above-entitled Court before said Honorable William C. Van Fleet on the 20th day of January, 1922; that when said trial began the defendants asked permission of the Court to introduce evidence in support of the defendants' pleas of former adjudications of the controversy involved in the above-entitled action before the plaintiffs should be permitted to offer evidence in support of the al-

legations of the bill of complaint; that such permission was granted by the Court, and the defendants thereupon introduced in evidence the judgment and judgment-roll in an action pending in the Superior Court of the State of California, in and for the County of Stanislaus, entitled Frederick V. Lineker, plaintiff, against Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife, defendants, and the judgment and judgment-roll in an action pending in said Superior Court entitled R. S. Marshall and Olive H. Marshall, plaintiffs, against Daniel A. McColgan, R. McColgan, and Eustace Cullinan, defendants; that pursuant to such permission the defendants also introduced in [128] evidence the remittitur of the District Court of Appeal, for the Third Appellate District, affirming the judgment in said first mentioned action and also introduced in evidence certain briefs filed in said action in the said Superior Court and in the said District Court of Appeal; that the foregoing was all the evidence introduced by any of the parties to this action; that after the introduction of such evidence in support of said pleas of former adjudications, counsel for defendants and counsel for plaintiffs argued the question of law as to whether such judgments supported said pleas of former adjudications; that said argument was made on the 24th day of January, 1922; that at the conclusion of said argument and on said 24th day of January, 1922, said Honorable William C. Van Fleet made the following statements from the bench, viz.:

"The COURT.—I am satisfied from the impression made upon my mind by this argument, to which I have listened with a great deal of interest, that I would not be justified in proceeding at this time to the trial of the case on the merits. I want to examine this question for myself in the light of the authorities and in the light of the pleadings in the former cases, in the State Court; but I am very strongly impressed with the fact that the contention is well taken. Mr. Taugher, I have heard you through now?

Mr. TAUGHER.—I was going to ask you a question.

The COURT.—Ask the question. What is it?

Mr. TAUGHER.—I was going to say, if your Honor would like to have them, that there are various points upon which I can supply authorities if your Honor would give me permission.

The COURT.—Oh, you ought to know that I never decide [129] anything blindly when I can have information from either side. But the question, the principles involved in the doctrine of *res adjudicata* are very well settled and they do not proceed along the narrow lines that it seems to me counsel for plaintiffs, would be inclined to desire to confine them. It is not a question of whether or not in all of its refinements the same precise matters have been litigated in their fullness in one case,—if they occur in another case and if the essential principles involved in the case at hand has in another action been adjudicated and under pleadings where the same substantive grounds may have

or might have been adjudicated, although even not in their fullness, yet if the party had the opportunity in an action involving the same substantive rights to have those facts adjudicated and the judgment is in fact adjudicated, on principles there presented, he can not have another day in Court to relitigate those fundamental principles.

Mr. TAUGHER.—Yes.

The COURT.—Now then, I am only suggesting this, of course, in a tentative way, because I am not fully satisfied myself that this defense is not well taken, and I will be perfectly frank to say, because I have become so familiar with the facts underlying this whole transaction with reference to this woman's property, that it is a stench in the nostrils of any honest man, the manner in which this woman's property was taken from her originally. It was little less than downright robbery. And I have stated it before in the presence of those who are responsible, and I again insist upon it, that the evidence that they may have given in the past in Courts of justice under certain [130] circumstances, does not change my attitude at all, because in the case of Mrs. Lineker against Dillon and in the subsequent contempt proceedings the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion which should be based upon them; and therefore I desire if possible to reach the merits of this controversy. The character in which that occurred was brought out, was well illustrated, well evidenced upon the stand by one of

the McColgans—I don't know whether it is the one that is still alive or the one that is dead—

Mr. TAUGHER.—He is dead.

The COURT.—Where he voluntarily made the suggestion that he felt—I don't remember exactly how he expressed it—but undoubtedly it was on his conscience that he had felt that perhaps there was something coming to Mrs. Lineker and that he had had that in mind to come to a settlement with her, although he said he had not.

Mr. TAUGHER.—Yes, your Honor—offered settlement with her for several thousand dollars.

The COURT.—Yes, I have forgotten. But underlying that declaration, which was forced from him undoubtedly by his conscience, was this history of a state of facts that should make any honest man blush. Therefore I say that if I can get away from this technical objection—technical in the sense that it does not involve the merits—I shall do so; but I frankly say to you now that I can not see my way clear upon the presentation that has been had here, and it has been a very thorough one, of avoiding the objection that has been made here. [131]

Mr. TAUGHER.—May we make a suggestion?

The COURT.—Mr. Taugher, what is your suggestion? I don't like to be interrupted or to be bombarded with questions after I have given my ruling.

Mr. TAUGHER.—Pardon me.

The COURT.—What is it you wish to suggest?

Mr. TAUGHER.—I was going to say that if

after your Honor reads those pleadings and you are still not satisfied, if your Honor will give me permission then to write a litle brief on the matter I will be glad to do it.

The COURT.—I don't believe for a moment with the presentation that has been made here that there will be any room for any further light to be cast upon it by counsel. I just want to look at these pleadings for myself and I believe that with my experience in the construction of pleadings that I will be just as well satisfied with my own construction as I would with the construction of counsel, when I decide. But, as I say, I am satisfied that I would not feel justified to go on with the merits of this case until this question has been definitely settled, because of my very strong view that it would not be possible to do so with the strong conviction I now have that the judgment—that the defense will have to be sustained. Now, of course counsel at the bar is not responsible for this; I don't know who has been responsible; but this woman's rights have been butchered in the past, and in my judgment she had a fine property there and it has been gotten away from her. Happily for her she was enabled through the efforts of one of the counsel in this case to recover a very considerable quantity of her [132] property that had been, or its equivalent, taken from her. But that this property to-day is worth a great deal than has been recovered back to her I do not doubt.

Mr. TAUGHER.—Worth a hundred thousand dollars.

Mr. PARTRIDGE.—What nonsense.

The COURT.—I will continue the case on the merits until I have been able to examine those questions for myself, with the hope, as I say, that I may be able to avoid this defense but with the fear that I shall not be able to.

Mr. HARWOOD.—Has your Honor any objection to my handing you a memorandum on that matter containing the authorities?

The COURT.—No, sir; I don't wish any memorandum. I do not wish you to be heard in any further way than you have been.

Mr. HARWOOD.—I have handed counsel here this.

The COURT.—Well, hand it to the Clerk—are you asking to file something?

Mr. HARWOOD.—No, that is the only idea I had.

The COURT.—Oh, yes; I am willing for you to offer anything that has been presented here.

Mr. TAUGHER.—I did not file any authorities. If you care to have me I will do so.

The COURT.—I think it might be well to have this argument written out. Have you been taking down this whole thing (addressing the Reporter)?

The REPORTER.—Yes, and with the assistance of the documents and pleadings I can transcribe it.

The COURT.—I don't care anything about that. Give me the citations. The case on the merits is continued indefinitely [133] until I have opportunity to go into this matter. Is there anything

else. This stands submitted on the feature of the defense, the question of *res adjudicata.*"

That the foregoing statements made by said Honorable William C. Van Fleet were taken down in shorthand by the official stenographic reporter of said Court; that said Honorable William C. Van Fleet is designated in the foregoing statement by the words "The Court"; that at the time the foregoing statements were made by said Honorable William C. Van Fleet no evidence had been offered or received in support of any of the issues in the above-entitled action except in support of the issues raised by the defendants' affirmative pleas of former adjudications; that affiant is a brother of said Daniel A. McColgan, deceased, and was beneficially interested with said Daniel A. McColgan in the transactions between the plaintiffs herein and Daniel A. McColgan referred to in the bill of complaint herein; that at all times in this affidavit mentioned, said Honorable William C. Van Fleet knew that affiant was a brother of said Daniel A. McColgan and at all of said times knew that affiant was and is beneficially interested with said Daniel A. McColgan in all of said transactions; that said Honorable William C. Van Fleet believes that affiant and said Daniel A. McColgan robbed the said plaintiff Norvena Lineker and believes that affiant is a dishonest and unscrupulous man; that said Honorable William C. Van Fleet believes that said Daniel A. McColgan was a dishonest and unscrupulous man; that such belief on the part of said Honorable William C. Van Fleet is not based upon any evidence

received in any action or proceeding in which either affiant or said Daniel A. McColgan was a party or to which either affiant or said Daniel A. McColgan was privy, and is not based on any evidence [134] received or introduced in the above-entitled action or suit; that if said Honorable William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on the part of said Honorable William C. Van Fleet will prevent said Honorable William C. Van Fleet from determining such issues with impartiality; that said Honorable William C. Van Fleet believes that said plaintiff Norvena Lineker was grievously wronged by affiant and said Daniel A. McColgan in the transactions described in the bill of complaint herein; that such belief on the part of said Honorable William C. Van Fleet is not based on any evidence received in any action or proceeding in which either affiant or said Daniel A. McColgan was a party, or to which affiant or Daniel A. McColgan was privy, and is not based on any evidence received in the above-entitled action or suit; that if said William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on his part will prevent him from determining such issues with impartiality; that neither affiant nor said Daniel A. McColgan was or is in fact dishonest or unscrupulous; that neither affiant nor said Daniel A. McColgan ever robbed, or defrauded, or took any undue advantage of said plaintiff Norvena Lineker, or of any other person; that said plaintiff Norvena Lineker was never wronged or defrauded by affiant

or by said Daniel A. McColgan; that in all transactions between affiant and said Daniel A. McColgan, on the one part, and said Norvena Lineker on the other part, said affiant and Daniel A. McColgan acted honestly and with good faith; that the reasons why this affidavit was not filed not less than ten days before the beginning of the term of the above-entitled court are as follows: that affiant did not at any time prior to the 24th day of January, 1922, know that said Honorable William C. Van Fleet had a personal [135] prejudice or bias against affiant or a personal prejudice or bias in favor of said plaintiff Norvena Lineker; that on said 24th day of January, 1922, the said Honorable William C. Van Fleet ordered that the trial of the above-entitled action or suit be continued indefinitely until said Honorable William C. Van Fleet had an opportunity to determine the sufficiency of said pleas of former adjudications, and at the time of making said order, said Honorable William C. Van Fleet stated that he would try no cases at San Francisco until after the month of March as he would be engaged during the month of March in trying cases at the City of Sacramento; that the official stenographic reporter who took down the said statements of said Honorable William C. Van Fleet, as aforesaid, was not the regular stenographic reporter of said court but was merely acting as such reporter on the 24th day of January, 1922, in the place of the regular stenographic reporter; that the stenographic reporter who took down said statements in shorthand as aforesaid is named W. L.

Flannery and is regularly employed as a stenographic reporter by the Railroad Commission of the State of California; that after the 24th day of January, 1922, Alfred J. Harwood, affiant's counsel herein, made diligent effort to communicate with said W. L. Flannery and on several occasions called at the office of the said Railroad Commission to see said W. L. Flannery so that he would request said W. L. Flannery to transcribe his notes taken on the said 24th day of January, 1922, but affiant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California, acting as official stenographic reporter for the said Railroad Commission at hearings held at Eureka and said other places; that affiant's said counsel used reasonable diligence in making such request of said W. L. Flannery and [136] used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922, as aforesaid; that affiant's said counsel was unable to obtain a transcript of said notes until the last week in the month of February, 1922; that on the said 24th day of January, 1924, said Honorable William C. Van Fleet did not continue the trial of the above-entitled action or suit to any definite day or term of said Court, but continued the trial thereof indefinitely; that the time for the trial of said action or suit has not yet been set.

WHEREFORE affiant, the said defendant, prays that the Honorable William C. Van Fleet proceed

no further in the above-entitled action, but another Judge shall be designated in the manner prescribed in Section 20 of the Judicial Code, or chosen in the manner prescribed in Section 23 thereof, to hear such matters.

R. McCOLGAN.

Subscribed and sworn to before me this 16th day of March, 1922.

[Seal] E. J. CASEY,

Notary Public, in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL OF RECORD.

I, the undersigned, Alfred J. Harwood, counsel of record for the above-named defendant R. McColgan, do hereby certify that the foregoing affidavit and application are made in good faith.

ALFRED J. HARWOOD,

Counsel of Record for said Defendant,

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [137]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Notice of Motion and Application of Adelaide McColgan.

To the Plaintiffs, and to John L. Taugher, Esq., Their Attorney; to Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and to John S. Partridge, Esq., Their Attorney; and to Defendant Eustace Cullinan, and to Messrs. Cullinan & Hickey, His Attorneys:

You will please take notice that on March 16th, 1922, the defendant Adelaide McColgan, as administratrix with the will annexed of the Estate of Daniel A. McColgan, deceased, made and filed in the above-entitled cause an affidavit (accompanied by a certificate of counsel of record that such affidavit and application are made in good faith), that Honorable William C. Van Fleet, the Judge before whom said cause is pending, has a personal bias or prejudice against said defendant

and in favor of the plaintiff Norvena Lineker, a copy of which said affidavit is hereunto attached and made a part of this notice. You will also please take notice that on Monday, the 27th day of March, 1922, at the hour of 10 o'clock A. M., at the courtroom of the above-entitled Court, at San Francisco, California, said defendant will move Honorable William C. Van Fleet, the Judge of the above-entitled [138] Court, to designate another Judge in the manner prescribed in Section 20 of the Judicial Code and to make such order in the premises as is provided in Section 21 of the Judicial Code of the United States.

Such motion will be made upon the ground that said defendant has made and filed said affidavit, accompanied by the certificate required by law, and will be based upon said affidavit, said certificate, this notice of motion, and the pleadings in the above-entitled suit.

ALFRED J. HARWOOD,
Attorney for Said Defendant.

ADMISSION OF SERVICE.

Service and receipt of a copy of the foregoing notice of motion and application is hereby admitted this 20th day of March, 1922.

JOHN L. TAUGHER and
WM. F. ROSE,
Attorneys for Plaintiffs.
JOHN S. PARTRIDGE,
Attorney for Certain Defendants Above Named.
CULLINAN & HICKEY,
Attorneys for Defendant, Eustace Cullinan.

(Here follows copy of affidavit, etc.)

[Endorsed]: Filed Mar. 22, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [139]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Notice of Motion and Application of R. McColgan.

To the Plaintiffs, and to John L. Taugher, Esq., Their Attorney; to Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and to John S. Partridge, Esq., Their Attorney; and to Defendant Eustace Cullinan, and to Messrs. Cullinan & Hickey, His Attorneys:

You will please take notice that on March 16th, 1922, the defendant R. McColgan, made and filed in the above-entitled cause an affidavit (accom-

and in favor of the plaintiff Norvena Lineker, a copy of which said affidavit is hereunto attached and made a part of this notice. You will also please take notice that on Monday, the 27th day of March, 1922, at the hour of 10 o'clock A. M., at the courtroom of the above-entitled Court, at San Francisco, California, said defendant will move Honorable William C. Van Fleet, the Judge of the above-entitled [138] Court, to designate another Judge in the manner prescribed in Section 20 of the Judicial Code and to make such order in the premises as is provided in Section 21 of the Judicial Code of the United States.

Such motion will be made upon the ground that said defendant has made and filed said affidavit, accompanied by the certificate required by law, and will be based upon said affidavit, said certificate, this notice of motion, and the pleadings in the above-entitled suit.

ALFRED J. HARWOOD,
Attorney for Said Defendant.

ADMISSION OF SERVICE.

Service and receipt of a copy of the foregoing notice of motion and application is hereby admitted this 20th day of March, 1922.

JOHN L. TAUGHER and
WM. F. ROSE,
Attorneys for Plaintiffs.
JOHN S. PARTRIDGE,
Attorney for Certain Defendants Above Named.
CULLINAN & HICKEY,
Attorneys for Defendant, Eustace Cullinan.

(Here follows copy of affidavit, etc.)

[Endorsed]: Filed Mar. 22, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [139]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Notice of Motion and Application of R. McColgan.

To the Plaintiffs, and to John L. Taugher, Esq., Their Attorney; to Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and to John S. Partridge, Esq., Their Attorney; and to Defendant Eustace Cullinan, and to Messrs. Cullinan & Hickey, His Attorneys:

You will please take notice that on March 16th, 1922, the defendant R. McColgan, made and filed in the above-entitled cause an affidavit (accom-

Reply Affidavit to Defendants' Motions and Affidavits Alleging Personal Bias and Prejudice of the Trial Judge Herein.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Frederick V. Lineker, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs in the above-entitled suit; that Norvena Lineker died in Alameda County, State of California, on the 25th day of February, 1922; that by order of the Superior Court of the State of California in and for the County of Alameda, duly made and entered on the 29th day of March, 1922, affiant was duly appointed the administrator of the estate of said Norvena Lineker, deceased, duly qualified, and now is acting as such.

That said affiant individually and as said administrator of the estate of his former wife, Norvena Lineker, deceased, makes this affidavit in reply to the affidavits heretofore made and filed by Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and also in reply to the affidavit of R. McColgan, both defendants in the [142] above-entitled suit, who allege personal bias and prejudice against said McColgans by Honorable William C. Van Fleet, sitting as Judge of the above-entitled court and in the above suit. That affiant in reply to said affidavits so filed herein on or about March 20, 1922, alleges and avers as follows:

That affiant and his wife on or about January 22, 1922, were present in the above court at the commencement of trial of this suit on the issues joined by the plaintiff's bill of complaint and the defendants' answers thereto; that at no time prior to the commencement of said trial on January 22, 1922, were there any affidavits or allegations of any kind or nature made against said Honorable William C. Van Fleet, charging personal bias or prejudice on his part against either Daniel A. McColgan or R. McColgan, or any other person now named as one of the defendants in said suit.

That as a part of said defendants' case they interposed their pleas of *res judicata* on January 22, 1922, averring in support thereof, that by reason of certain litigation theretofore conducted in the State Courts of California, the same was a complete bar to any further proceedings on the part of plaintiffs in this suit. That no one of the defendants other than the said McColgans have intervened or participated in the presentation of said affidavits alleging personal bias and prejudice on the part of said Honorable William C. Van Fleet as said presiding Judge; that said Adelaide McColgan and R. McColgan only have presented such affidavits charging personal bias and prejudice; that there are nine other defendants. That said defendants, Adelaide and R. McColgan, in their own behalf raised said pleas of *res judicata,* with the other defendants, and duly submitted the same for decision to this Court; that after the presentation of said [143] pleas of *res judicata,* the ar-

guments thereon, the submission for decision and after an adverse ruling by the said Honorable William C. Van Fleet denying their pleas so raised and submitted by the defendants, including the said Adelaide and R. McColgan, said defendants last above named have now filed their affidavits charging personal bias and prejudice on the part of the said trial Judge, in an unjust and wrongful endeavor to remove him from the trial of said suit because, as affiant believes and avers, of said adverse ruling against said defendants.

That only a portion of the proceedings are set forth in said affidavits, and no part of the arguments of counsel. That the said purported transcript of the occurrences and remarks of court and counsel as set forth in said defendants' affidavits merely disclose the expression of the trial judge in commenting upon facts in a prior case already passed on, to which comments no exceptions were then and there taken by any of the defendants, and which, when taken as a whole, in no wise and in no manner express any personal prejudice or personal bias on the part of the trial Judge against the defendants, Adelaide or R. McColgan. On the other hand, it is clearly shown from the statements of said trial Judge, that the Court permitted and desired the presentation of further points and authorities on defendants' pleas of *res judicata* before continuing the case for trial on the merits and which pleas it was indicated he might have to sustain. That this indicated he could have no personal bias or prejudice as to said merits, no evi-

dence having been presented to him to pass on. That at no time or place did said presiding Judge so express himself as to indicate that he would in any way in passing upon the merits be unable to give a fair and impartial trial to the said defendants, Adelaide, or R. [144] McColgan, or either of them. That certain comments by the Court were called forth by the arguments of counsel on said 24th day of January, 1922, but they in no way referred to the said McColgan Brothers, in this suit, or in any way indicated that the said Court could not fairly or impartially try this suit on its merits. That said affidavits so filed are attempts, following an adverse decision, after commencement of trial, to assault the integrity of the trial Judge. That said statements of the trial court and colloquy between Court and counsel, were duly made in a regular discharge of the judicial duty of the Court in passing upon the motion made and the arguments of counsel, and in the due course of the trial of a case begun before the said Court, in which no charge of personal bias or prejudice had ever been made prior to the commencement of said trial.

That affiant believes, and therefore avers that the said Honorable William C. Van Fleet does not believe that the said Daniel A. McColgan or R. McColgan, or either of them, in any way were dishonest or unscrupulous, or had robbed the said plaintiffs; denies that said Honorable William C. Van Fleet as trial Judge in the said suit had or has any personal bias or personal prejudice against the said McColgans whatsoever; denies that said

Honorable William C. Van Fleet believes that said Daniel A. McColgan was a dishonest or an unscrupulous man. Affiant believes, and so avers, that the said Honorable William C. Van Fleet is not, nor at any time has he been, biased or prejudiced against any of the parties to the said suit, and further avers that such issues as may be tried in said suit will be determined by him fairly and impartially on the evidence as presented. Affiant further avers that no facts are averred in said affidavits from which it can reasonably or otherwise be inferred the said Honorable William C. Van Fleet as said judge at any time or place has had, or that he now has, [145] any belief or opinion whatsoever that either of the said McColgan brothers wronged or defrauded the plaintiff Norvena Lineker, or any other person, but that the said Judge presiding in this suit at all times can and will act fairly and impartially in the trial of the same on the merits.

That the said affidavits of said Adelaide McColgan and R. McColgan are impertinent, scandalous, untrue, unwarranted, and a wrongful attack upon the integrity, fairness and impartiality of the trial Judge, made after an adverse decision on said defendants' pleas of *res judicata,* interposed after the commencement of, and during trial.

WHEREFORE, affiant avers and prays that said charges so made be adjudged to be impertinent, scandalous, untrue and unwarranted; that said defendants' motion to call in another Judge to conclude said trial be denied; and that said affidavits

alleging personal bias and prejudice, the motions and documents in support thereof, be stricken from the files in this suit. Further affiant sayeth not.

FREDERICK V. LINEKER.

Subscribed and sworn to before me this 30th day of March, 1922.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California. [146]

Copy of the within affidavit received this 30th day of March, 1922.

_____,

Solicitor for Defendants Adelaide McColgan and R. McColgan.

CULLINAN & HICKEY,

Solicitors for Defendant Eustace Cullinan.

JOHN S. PARTRIDGE,

Solicitor for the Remaining Defendants.

[Endorsed]: Filed Apr. 1, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [147]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 506.

FREDERICK V. LINEKER et al.,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Stenographic Reporter's Transcript of Proceedings on Motions and Applications.

Monday, April 3, 1922.

Outline of argument on defendants' motions and affidavits alleging personal bias and prejudice of the trial Judge herein.

ALFRED J. HARWOOD, Esq., Appearing for Defendants.

WM. F. ROSE, Appearing for Plaintiffs.

Mr. HARWOOD.—(Read "affidavit of the defendant Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and certificate of counsel of record.")

Mr. HARWOOD.—(Contg.) Now if the Court please the affidavit of the other defendant R. McColgan is in most respects similar and contains practically the same reasons and I would ask the Court that they may be considered read. Now, if the Court please, I have carefully examined the authorities. A case decided by the United States Supreme Court, Berger vs. United States, 255 [148] U. S. 32—and that case and the other authorities hold that clearly, or to the effect rather, that this affidavit fully complies with Section 21 of the Judicial Code. (Stated case of Berger vs. United States.)

The COURT.—I tell you, Mr. Harwood, all this that you have stated here is based upon facts that came out in the case of Lineker vs. Dillon and that

was fully known to the parties long before this came up. With that knowledge *that* proceeded to submit this case to this Court, and they then went so far as to leave it under submission to this Court after the remarks made there based upon the evidence in Lineker vs. Dillon and the presentation accordingly comes too late. You cannot eat your cherries and have them. You must proceed in accordance with the statute and take your remedy within the time, or be able to show some reason why you failed to. There is no reason here shown. You were willing to permit the matter to be submitted to this Court and took your chance on a favorable decision and the Court, having reached the conclusion that there was not sufficient before it to enable it to pass upon the defense of *res adjudicata,* set that submission aside, and now the party comes in and sets up prejudice.

Mr. HARWOOD.—If the Court please, in the first place permit me to make the statement that I had to get the facts together and prepare this affidavit which took some time as shown by the affidavit itself.

The COURT.—You had lots of time before the Court reached the conclusion that it could not on the facts determine on the question of *res adjudicata.* You had several weeks to do that before the Court announced its conclusion and set the case at [149] large again for a trial upon the merits.

Mr. HARWOOD.—In this matter I would ask your Honor before passing on the matter to read the points and authorities which are filed.

The COURT.—I will do that certainly. I do not know this family of McColgans but I do know what my judgment is upon sworn evidence given before me in a trial and I took occasion in the case in question, and it is referred to in this affidavit, in the recital of the affidavit, and I took occasion at that time in the Lineker vs. Dillon case to state that the evidence of the man himself showed that he had been guilty of it. That is all I did. Now if that constitutes legal prejudice here of course that is one thing but I do not think it does.

Mr. HARWOOD.—The matter that you have suggested that the affidavit was filed too late is a matter that I have not discussed in the briefs.

The COURT.—Both your clients knew the attitude of mind of the Court on what occurred in the case of Lineker vs. Dillon. Your clients were present and heard the comments of the Court upon the disclosures in that case and that is exactly what is set forth in this affidavit and nothing else, and those statements arose solely, and were based solely, upon the sworn evidence in that case. Now, if that constitutes that character of bias and prejudice which will preclude one who was only desirous of stating the facts from hearing a case then that is all right.

Mr. HARWOOD.—I think it does if the Court please.

The COURT.—Well, I do not think so. I will give you a chance to be heard on the matter of time in presenting the matter. I will hear from the other side. [150]

Mr. BELL.—I have an affidavit here of Frederick V. Lineker—

Mr. HARWOOD.—I wish to object to the reading of the affidavit on the grounds stated in the case of Berger vs. United States.

The COURT.—Read it. Let me hear it.

(Mr. Bell read affidavit of Frederick V. Lineker.) (Also read Section 21 of the Judicial Code and commented on Justice McKenna's decision in case of Berger vs. United States.)

Mr. BELL.—There are eleven defendants in the case, two are complaining, the other nine are not.

The COURT.—I do not think there is anything in that. I think if there were a hundred defendants if one could show prejudice here the case could not be tried as to him by a prejudiced Judge.

Mr. BELL.—I understand that theory, but what I wanted to point out is that at the time when the statements were alleged to have been made, on the 25th of January, there was no objection made or exceptions taken under the rule to any of the remarks of the Court by any of the defendants or counsel—not one out of the entire eleven. It is very clear from a portion of the affidavit which I set out in my brief where the Court said, "I will continue the case on the merits until I have been able to examine those questions for myself with the hope, as I say, that I may be able to avoid this defense but with the fear that I shall not be able to," which indicates a leaning toward the defendants' side of the case and clearly does not show any [151] prejudice.

The COURT.—I do not believe any counsel familiar with the history of the matter would file any such affidavit. Counsel claims he did not know anything about it. If he didn't he should have inquired.

Mr. BELL.—(On point of exceptions to remarks of the Court Mr. Bell cited following cases:

Denver v. Home Savings Bank, 200 Fed. 28.
Railway Company v. Heck, 102 U. S. 120.
Potter v. United States, 122 Fed. 49.
————, 196 Fed. 203.)

(Contg.) It seems to me that this is entirely too late for alleging personal prejudice contemplated by this Code section after the motion bringing the matter before the Court is made, then submitting to the jurisdiction of the Court, awaiting a decision and then after an adverse ruling to come in and interfere in this way with the trial of a case is not permitted under any authorities either in the State or Federal courts.

The COURT.—(To Mr. Harwood.) I will give you five days in which to answer this proposition that your affidavit was presented too late.

Mr. HARWOOD.—Yes, your Honor.

The COURT.—And then they can have five days in which to answer. Are the points and authorities on file on the general proposition?

Mr. HARWOOD.—Yes, your Honor. Will your Honor rule on the objection to the reading of the affidavits?

The COURT.—Yes, it is overruled.

Mr. HARWOOD.—Will you note an exception Mr. Clerk?

The COURT.—He doesn't need it, but you will be accorded it if anything comes up on a bill of exceptions. [152]

At a stated term, to wit, the July term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 21st day of August, in the year of our Lord one thousand nine hundred and twenty-two—Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

Minutes of Court—August 21, 1922—Order Denying Motions for Designation of a Judge Other Than Honorable Wm. C. Van Fleet.

The motion of defendants Adelaide McColgan, as administratrix with the will annexed of the Estate of Daniel A. McColgan, deceased, and the motion of defendant R. McColgan, for the designation of a Judge other than Honorable William C. Van Fleet, under the provisions of Sec. 20 of the Judicial Code, heretofore submitted being now fully considered and the Court having filed its memorandum opinion, it is ordered that said motions be and they are hereby denied; to which ruling the said defendants duly excepted. [153]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 506.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER,

Plaintiff,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in the Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Memorandum Opinion.

JOHN L. TAUGHER and WM. F. ROSE, San Francisco, Cal., Attorneys for Plaintiff.

ALFRED J. HARWOOD, San Francisco, Cal., Attorney for Defendants R. McColgan and Adelaide McColgan, Administratrix, etc.

VAN FLEET, District Judge:

This is an application under the supposed sanc-

tion of Section 21 of the Judicial Code to disqualify the Judge of this Division in the further disposition of this cause for the alleged entertaining of a sentiment of personal bias and prejudice against two of the defendants, R. McColgan and Daniel A. McColgan, deceased, the intestate of the defendant Adelaide McColgan, the administratrix of his estate. The proceeding was inaugurated under these circumstances: [154]

The cause, which had been pending and at issue for a year or more, came on for trial on January 22d of the present year and thereupon a request was made by the defendants that the Court permit them, before entering upon a hearing of the merits, to interpose proof in support of their special defense of *res judicata* which it was claimed would save much unnecessary time. This course was allowed and thereupon, after the introduction of certain record proof by the defendants in the form of judgment-rolls in certain actions theretofore adjudicated in the State courts and full argument by counsel on both sides, which ended on January 24th, the question as to the sufficiency of the evidence to sustain such defense was submitted, with the understanding that the hearing on the merits of the case would be continued to abide the Court's ruling upon the special defense. In taking the matter under advisement the Court gave expression in substance to the statement set forth in the affidavit of the defendant Adelaide McColgan and now relied upon as disclosing the bias and prejudice in the mind of the Court, afford-

ing the basis of this application. At the time of this statement by the Court all the defendants, with their several counsel were present and no objection, suggestion or intimation was made indicating that there existed in the mind of any one of them the idea that there was any ground arising on the remarks of the Judge for the objection now made; but the Court was permitted to take the case under advisement with the announcement that it would examine into the evidence and authorities bearing upon the special plea and with the tentative suggestion that it was impressed with the idea from the presentation had that the defense would have to be sustained. The case rested under submission from January 24th until March 13, whereupon the Court, in the presence of the parties and their counsel, announced its oral opinion on the question in the following terms: [155]

"In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 506.

"FREDERICK W. LINEKER et al.,
Plaintiffs,

vs.

R. S. MARSHALL et al.,
Defendants.

"The COURT (Orally).—In this case the action was recently on the calendar for trial and at the

trial the defendant primarily presented questions of *res judicata* based upon two separate actions in the State court claimed to be dependent upon the same issues. As I had occasion to say at the time, if this plea should be held good it would be unnecessary to go into a consideration of the merits of the case which would necessitate the taking of a considerable amount of evidence, and I therefore let the parties submit this question and continued the hearing on the issue*d* involved in the merits.

"As a result of further consideration I am left in very decided doubt as to whether or not there is sufficient identity of issues between the questions involved here and those presented in the cases in the State court, and particularly whether in one of those cases, that of Lineker vs. McColgan, all the questions that were found upon by the court below there were litigated. Judging from the presentation taken from the briefs of the defendant here, in the Supreme Court in that case it looks much as though the court had gone outside any presentation of facts before it and found upon a number of questions that were not mooted at the trial and of course, if that is true, they cannot be made the proper basis here for the doctrine of *res judicata;* and I am satisfied that it can only be determined, as to what precise issues were before the State court in those cases, in a manner to enable this court to definitely pass upon them, by resorting to the evidence that was presented to the State [156] court. Of course the doctrine includes the right to present to the court not only the issues as presented by the

pleadings but the evidence itself as to what was really before the court on the trial, the judgment of which is sought to be interposed as the basis of the defense of *res judicata.*

"The result is that the submission heretobefore had in the case will be set aside and the case restored to the calendar for a final hearing upon the issues made."

Thereupon, in accordance with the suggestion in said opinion, the Court made an order that the cause be restored to the calendar for a final hearing upon all the issues. Thereafter on the 16th day of March and before the hearing of the cause was resumed the affidavits relied on by the moving defendants, Adelaide McColgan and R. McColgan, were presented and filed, none of the other defendants joining therein or participating in their subsequent presentation. Subsequently the plaintiff, Frederick V. Lineker (his codefendant, Norvena Lineker, having deceased and he having been appointed administrator of her estate) asked and was granted leave to file an affidavit in response to those presented by the defendants, and thereafter the matter came on to be heard before the Court upon a formal motion by the moving defendants for the granting of the application. Upon this hearing it appeared that the subject matter upon which the Court's alleged bias and prejudice is now predicated first arose in the case of Norvena Lineker vs. Mary J. Dillon, et al., involving another phase of the same controversy tried before the Court in 1919 and in which Daniel A. McColgan

testified as to his relations to the property of Norvena Lineker during which trial the Judge first gave voice to expressions [157] substantially similar to those complained of here—both of the McColgans being in court at the time. It was further made to appear at the hearing that the Judge had absolutely no personal acquaintance with either Daniel A. McColgan or R. McColgan and was unable to distinguish them by their names and, as then stated by the Judge, any idea or sentiment of personal bias or prejudice against the McColgans had never entered his mind but that all that had been expressed by him and now made the subject of complaint was based solely and alone upon impressions made upon his mind by the testimony in the case of Lineker vs. Dillon given by Daniel A. McColgan as to his participation in the transaction there involved and that the Judge was not now aware of any sentiment or feeling that would preclude him from giving a fair and impartial trial to the issues involved in this cause as to all the defendants.

Assuming that the application has been made in good faith I think it sufficient to say that the facts do not in my judgment afford a sufficient basis to work a disqualification under Section 21 of the Code. In the first place by its very terms the section negatives the idea that a party may sit by after having the claimed disqualifying circumstances brought directly to their knowledge months before the term and let the cause go to trial without interposing the objections. The disqualifying affi-

'davit must be filed ten days before the term "unless good cause be shown for the failure"; and this cause must appear on the face of the affidavit. Here the substantive evidence of the claimed bias and prejudice had been presented to the complaining defendants as early as the trial of Lineker vs. Dillon in 1919, and there is nothing to excuse the delay. If it be claimed that the disqualification [158] was disclosed for the first time upon the statement made by the Judge on the submission of the question of *res judicata* the defendants are in no better position since it appears that they sat mute under that statement without objection or suggestion and permitted the cause to be taken under submission and held for over six weeks before decision and then moved only when the conclusion of the Judge was not what they had hoped. A party cannot be permitted to thus sit silent and gamble on a favorable result and, losing out, attempt for the first time to assert his right. I am satisfied the assertion of the right claimed here came too late to justify its recognition.

But there is another and deeper reason for denying the application. A consideration of the section under which the claim is made shows at once that the mere assertion of a bias or prejudice on the part of a Judge is insufficient to work a disqualification. There must be a statement of the facts tending to show such state of mind; and obviously those facts must be such as would reasonably be calculated to disclose the existence of the disqualifying attitude specified in the Statute.

The facts stated in these affidavits wholly fail to meet that requirement. "Personal" bias or prejudice cannot properly be said to arise from views formed in the mind of a Judge, however freely expressed, founded upon sworn testimony in a cause before him upon which he is called upon to pass. If it were otherwise no Judge would be qualified to re-try a cause upon which he had been required to pass where for any reason the judgment first entered had to be set aside and the cause reheard. This is not the meaning of the statute.

For these reasons the application is denied.

[Endorsed]: Filed August 21, 1922. Walter B. Maling, Clerk. [159]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Order Making Certain Proceedings a Part of the Record Herein.

On motion of the defendants Adelaide McColgan, as administratix with the will annexed of the estate

of Daniel A. McColgan, deceased, and R. McColgan. It is hereby ordered that the following matters and proceedings be and the same are hereby made a part of the record herein viz.:

1. The affidavit of the defendant Adelaide McColgan as administratix of the state of Daniel A. McColgan purporting to have here made pursuant to section 21 of the Judicial Code and the certificate of counsel of record thereto attached, which said affidavit and certificate were filed with the clerk of the above-entitled Court on the 16th day of March 1922.

2. The affidavit of the defendant R. McColgan purporting to have here made pursuant to section 21 of the Judicial Code and the certificate of counsel of record thereto attached, which said affidavit and certificate were filed with the Clerk of the above-entitled Court on the 16th day of March 1922.

3. The notice of motion and application of the defendant Adelaide McColgan as administratix with the will annexed of the estate of Daniel A. McColgan, deceased for an order of the Honorable William C. Van Fleet designating another [160] Judge as provided in section 21 of the Judicial Code, which said Notice of Motion and Application was filed with the Clerk of the above-entitled Court on the 22d day of March, 1922.

4. The notice of motion and application of the defendant R. McColgan for an order of the Honorable William C. Van Fleet designating another Judge as provided in section 21 of the Judicial Code, which said notice of motion and application

was filed with the Clerk of the above-entitled Court on the 22d day of March, 1922.

5. The reply affidavit of the plaintiff Frederick V. Lineker to defendants' motions and affidavits alleging personal bias and prejudice which said affidavit of said plaintiff was filed with the Clerk of the above-entitled court on the 1st day of April, 1922.

6. The stenographic reporter's transcript of the proceedings at the hearing of the said motions and applications a copy of which is attached to notice of motions of the said defendants Adelaide McColgan as administratix with the will annexed of the estate of Daniel A. McColgan, deceased; and R. McColgan filed with the Clerk on the 30th day of August, 1922.

7. The opinion and order of the above-entitled court made on August 21, 1922, denying said motions and applications and the exceptions thereto of said defendants.

Done in open court the 18th day of September, 1922.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Sept. 18, 1922. Walter B. Maling, Clerk. [161]

At a stated term, to wit, the July term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Thursday, the 19th day of October in the year of our Lord one thousand nine hundred and twenty-two — Present: The Honorable WILLIAM H. HUNT, Circuit Judge.

(Title of Cause.)

Minutes of Court—October 19, 1922—Order of Substitution.

Upon motion of Wm. F. Rose, Esq., attorney for plaintiffs and upon suggestion of the death of Norvena Lineker one of the plaintiffs herein, it is ordered that Frederick V. Lineker, administrator of the estate of Norvena Lineker, deceased, be and he is hereby substituted as plaintiff in the place and stead of said Norvena Lineker, deceased. [162]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER as Administrator of the Estate of NORVENA LINEKER, Deceased,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in the Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Assignment of Errors.

Now come the above-named defendants Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased (substituted in the place and stead of said Daniel A. McColgan, deceased), and R. McColgan and file with their petition for an appeal from an order

made and entered in the above-entitled court on the 21st day of August, 1922, denying their motions for the designation of a Judge other than Honorable William Van Fleet under the provisions of section 20 of the Judicial Code, the following assignment of errors; and specify that said order is erroneous in this:

1. That upon the filing of the affidavit of said defendants accompanied by the certificate of counsel provided for by section 21 of the Judicial Code, it was the duty of the Judge to [163] designate another judge as provided in sections 20 and 21 of the Judicial Code.

2. That the Judge and the Court erred in denying said motion on the ground that the affidavits of said defendants did not state sufficient facts and reasons for the belief of such defendants that bias and prejudice existed, whereas in fact said affidavits and each of them state sufficient facts and reasons for the belief that bias and prejudice exists and existed.

3. That the Judge and the Court erred in denying said motions to designate another Judge on the ground that said affidavits were not filed within the time permitted by section 21 of the Judicial Code, whereas in fact said affidavits and each of them were filed within the time provided for by said section 21 of the Judicial Code.

4. That the Judge and the Court erred in denying said motions to designate another Judge on the ground that good cause was not shown for the failure to file said affidavits not less than ten days be-

fore the beginning of the term of the court, whereas good cause was in fact shown for such failure.

5. That the Judge and the Court erred in allowing to be read in evidence at the hearing of said motions the affidavit of the plaintiff, Frederick V. Lineker.

6. That the Judge and the Court erred in proceeding further in the above-entitled suit after the filing of said affidavits of said defendants accompanied by the certificate of counsel that the affidavits and applications are made in good faith.

7. That the Judge and the Court erred in holding that it was necessary for counsel for said defendants on January 24, 1922, to object to the statements then made by said Judge and that [164] for their failure to object the said defendants were debarred from thereafter urging the objection of bias and prejudice as specified in their said affidavits.

8. That the Judge and the Court erred in holding that said affidavits were not sufficient because they were made and filed after the Court had decided the questions of *res judicata.*

9. That the Judge and the Court erred in holding that bias and prejudice cannot be properly said to arise when the statements relied upon as showing bias and prejudice were made by the Judge in the course of the trial of an action to which action neither of said defendants nor their privies was a party.

Wherefore said defendants pray that said order be reversed.

Dated Oct. 19, 1922.

ALFRED J. HARWOOD,
Attorney and Solicitor for Said Defendants.

[Endorsed]: Filed Oct. 19, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [165]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER as Administrator of the Estate of NORVENA LINEKER, Deceased,
Plaintiff,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,
Defendants.

Petition for Order Allowing Appeal.

The above-named defendants, Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased (substituted in the place and stead of said Daniel A. McColgan, deceased), and R. McColgan conceiving themselves aggrieved by the order made and entered in the above-entitled court on the 21st day of August, 1922, denying the motion of said defendants for the designation of a Judge other than Honorable William C. Van Fleet under the provisions of section 20 of the Judicial Code, hereby appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit and upon the grounds specified in their assignment of errors filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made and [166] entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 19, 1922.

ALFRED J. HARWOOD,
Attorney and Solicitor for Said Defendants.

Order Allowing Appeal.

The foregoing petition for appeal is hereby allowed.

W. H. HUNT,
Judge.

[Endorsed]: Filed Oct. 19, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [167]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A.

McColgan, deceased, and R. McColgan, as principals, and American Indemnity Company, a corporation, duly organized and existing under the laws of the state of Texas, and engaged in business in said State of California pursuant to the laws thereof, as surety, are held and firmly bound unto the plaintiffs above named and to the defendants, R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Company, defendants above named in the sum of Five Hundred (500) Dollars, lawful money of the United States of America, to be paid to the said plaintiffs and to said defendants last named, their successors, heirs, executors, [168] administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

In Witness Whereof, the said principals have hereunto set their hands and seals, and the said surety has caused its corporate name and seal to be hereunto affixed, this 19th day of October, 1922.

THE CONDITION of the above obligation is such THAT WHEREAS on the 21st day of August, 1922, an order was rendered and entered in the above-entitled cause in the Southern Division of the United States District Court for the Northern District of California, Second Division, denying the motion of defendants, Adelaide McColgan, as administrator with the will annexed of the estate

of Daniel A. McColgan, deceased, and R. McColgan, for the designation of a Judge other than Honorable William C. Van Fleet, under the provisions of section 20 of the Judicial Code, and the said defendants last named having obtained an order allowing an appeal from said order, and a citation directed to the said plaintiffs and the defendants, R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Company, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco in said Circuit on the 17th day of November next.

NOW, THEREFORE, if the said defendants shall prosecute [169] said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ADELAIDE McCOLGAN, (Seal)
As Administratrix of the Will Annexed of the Estate of Daniel A. McColgan, Deceased.

R. McCOLGAN. (Seal)

AMERICAN INDEMNITY COMPANY.
By THEODORE P. STRONG, (Seal)
Attorney in Fact.

Order Approving Bond.

The above bond is hereby approved.

Dated at San Francisco, October 19, 1922.

W. H. HUNT,
Judge.

[Endorsed]: Filed Oct. 19, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [170]

(Title of Court and Cause.)

Praecipe for Record on Appeal.

To the Clerk of said Court:

Sir: Please prepare transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit and incorporate therein the following portions of the record:

1. Plaintiffs' amended bill of complaint.

2. Answer of the defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan.

3. The affidavit of the defendant, Adelaide McColgan as administratrix of the estate of Daniel A. McColgan, purporting to have been made pursuant to section 21 of the Judicial Code and the certificate of counsel of record thereto attached, which said affidavit and certificate were filed with the clerk of the above-entitled court on the 16th day of March, 1922.

4. The affidavit of the defendant, R. McColgan, purporting to have been made pursuant to section

21 of the Judicial Code and the certificate of counsel of record thereto attached, which said affidavit and certificate were filed with the Clerk of the above-entitled court on the 16th day of March, 1922.

5. The notice of motion and application of the defendant, Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, for an order of the Honorable William C. Van Fleet designating another Judge as provided in section 21 of the Judicial Code, which said notice of motion and application was filed with the Clerk of the above-entitled court on the 22d day of March, 1922.

6. The notice of motion and application of the defendant, R. McColgan, for an order of the Honorable William C. Van Fleet [171] designating another Judge as provided in section 21 of the Judicial Code, which said notice of motion and application was filed with the Clerk of the above-entitled court on the 22d day of March, 1922.

7. The reply affidavit of the plaintiff, Frederick V. Lineker to defendants' motions and affidavits alleging personal bias and prejudice which said affidavit of said plaintiff was filed with the Clerk of the above-entitled court on the 1st day of April, 1922.

8. The stenographic reporter's transcript of the proceedings at the hearing of the said motions and applications a copy of which is attached to notice of motions of the said defendants, Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and R.

McColgan, filed with the clerk on the 30th day of August, 1922.

9. The order of the above-entitled Court made on August 21, 1922, denying said motions and applications and the exceptions thereto of said defendants.

10. Opinion of Court filed on August 21, 1922.

11. Order making certain proceedings a part of the record herein filed on the —— day of September, 1922.

12. Order substituting Frederick V. Lineker as administrator in place and stead of plaintiff, Norvena Lineker.

13. Petition of the defendants, Adelaide McColgan as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and R. McColgan for order allowing appeal.

14. Assignment of errors.

15. Bond on appeal.

16. Order allowing appeal.

17. Citation on appeal and proof of service.

Dated: November 8, 1922.

ALFRED J. HARWOOD,
Solicitor for Appellants. [172]

ADMISSION OF SERVICE.

Service of the foregoing praecipe is hereby admitted this 8th day of November, 1922.

JOHN L. TAUGHER and
WM. F. ROSE,
Attorneys for Plaintiffs.
HAWKINS & HAWKINS,
MASTICK & PARTRIDGE,
Attorneys for R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company.
CULLINAN & HICKEY,
Attorneys for Defendant, Eustace Cullinan.

[Indorsed]: Filed Nov. 8, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [173]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred seventy-three (173) pages, numbered from 1 to 173, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same consti-

tutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $84.45; that said amount was paid by Alfred J. Harwood, Esq., attorney for defendants Adelaide McColgan, as Admrx., etc., and R. McColgan; and that the original Citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of December, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court, in and for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [174]

Citation.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Frederick V. Lineker and Frederick V. Lineker, as administrator of the estate of Norvena Lineker, deceased, the plaintiffs in a suit pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (number 506 in Equity on the records of said court) and to R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), Eustace Cullinan, E. C. Peck. T. K. Beard, Grace A. Beard, Union Savings

Bank of Modesto, and Stanislaus Land and Abstract Company, defendants in said suit, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, to wit, on the 17th day of November, 1922, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern Division of the Northern District of California (Second Division), wherein Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, and R. McColgan, are appellants, and you are appellees, to show cause, if any there be, why the order rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H, HUNT, United States Circuit Judge for the Ninth Circuit, this 19th day of October, A. D. 1922.

W. H. HUNT,
United States Circuit Judge. [175]

Service of the within citation, by copy, is hereby admitted, this 20th day of October, 1922.

JOHN L. TAUGHER,
WM. F. ROSE,
Attorneys for Plaintiffs.
HAWKINS & HAWKINS,
MASTICK & PARTRIDGE,
Attorneys for R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Unions Savings Bank of Modesto and Stanislaus Land and Abstract Company.
CULLINAN & HICKEY,
Attorneys for Defendant, Eustace Cullinan. [176]

[Endorsed]: No. 506—In Equity. United States District Court for the Northern District of California. Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, and R. McColgan, Appellants, vs. Frederick V. Lineker et al., Appellees. Citation on Appeal and Proof of Service. Filed Oct. 23, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3964. United States Circuit Court of Appeals for the Ninth Circuit. Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, and R. McColgan, Appellants, vs. Frederick V. Lineker and Frederick V. Lineker, as Administrator of the Estate of Norvena Lineker, Deceased, the Plaintiffs in a Suit Pending in the Southern Division of the

United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of Said Court), and R. S. Marshall, Olive H. Marshall, Mary J. Dillon (Formerly Mary J. Tynan), Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Company, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed January 2, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(EQUITY No. 506 in District Court.)

FREDERICK LINEKER et al.,
Plaintiffs and Appellees,

vs.

R. S. MARSHALL et al.,
Defendants and Appellees;

ADELAIDE McCOLGAN, etc., and R. McCOLGAN,
Defendants and Appellants.

Order Extending Time to and Including December 17, 1922, to File Record and Docket Cause.

GOOD CAUSE APPEARING, it is hereby ordered that the time of the above-named appellants to file the record of their appeal and docket the case with the clerk of the above-entitled court BE AND THE SAME IS HEREBY enlarged and extended to and including the 17th day of December, 1922.

Dated November 8th, 1922.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3964. In the United States Circuit Court of Appeals for the Ninth Circuit. Frederick Lineker et al., Plaintiffs and Appellees, vs. R. S. Marshall et al., Defendants and Appellees; Adelaide McColgan, etc., and R. McColgan, Defendants and Appellants. Order Enlarging Time to File Record and Docket Case. Dated November ——, 1922. Filed Nov. 8, 1922. F. D. Monckton, Clerk. Refiled Jan. 2, 1923. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(Undocketed.)

(EQUITY No. 506 in District Court.)

FREDERICK LINEKER et al.,
Plaintiffs and Appellees,

vs.

R. S. MARSHALL et al.,
Defendants and Appellees;

ADELAIDE McCOLGAN, etc., and R. McCOLGAN,
Defendants and Appellants.

Order Extending Time to and Including January 2, 1923, to File Record and Docket Cause.

GOOD CAUSE APPEARING, it is hereby ordered that the time of the above-named appellants to file the record of their appeal and docket the case with the clerk of the above-entitled court BE AND THE SAME IS HEREBY enlarged and extended to and including the 2d day of January, 1923.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3964. (Equity No. 506 in District Court.) In the United States Circuit Court of Appeals for the Ninth Circuit. Frederick Lineker et al., Plaintiffs and Appellees, vs. R. S. Marshall et al., Defendants and Appellees; Adelaide McColgan, etc., and R. McColgan, Defendants and Appellants. Order Enlarging Time to File Record and Docket Case. Filed Dec. 7, 1922. F. D. Monckton, Clerk. Refiled Jan. 2, 1923. F. D. Monckton, Clerk.

No. 3964

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADELAIDE MCCOLGAN, as administratrix with the will annexed of the estate of Daniel A. McColgan, and R. MCCOLGAN,

Appellants,

vs.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as administrator of the estate of Norvena Lineker, deceased, the plaintiffs in a suit pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of said Court), and R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON, (formerly Mary L. Tynan) EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

BRIEF FOR APPELLANTS.

ALFRED J. HARWOOD,
Attorney for Appellants.

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No. 3964

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADELAIDE MCCOLGAN, as administratrix with the will annexed of the estate of Daniel A. McColgan, and R. MCCOLGAN,

Appellants,

vs.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as administrator of the estate of Norvena Lineker, deceased, the plaintiffs in a suit pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of said Court), and R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON, (formerly Mary L. Tynan) EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal by the appellants, Adelaide McColgan, as administratrix with the will annexed

of the estate of Daniel A. McColgan, and R. McColgan, from a judgment and order of the District Court denying appellants' motions for the designation of a judge other than the Honorable William C. Van Fleet, which motions were made in pursuance of Sections 20 and 21 of the Judicial Code.

The suit is brought by the plaintiffs against these appellants, and other defendants, to set aside, on the grounds of alleged fraud, a deed of trust made to R. McColgan and Eustace Cullinan, as trustees, and also to set aside on the same ground a sale made by said trustees to defendant, E. C. Peck, pursuant to said deed of trust. The bill of complaint also seeks an accounting from the defendants Daniel A. McColgan (now represented by the appellant Adelaide McColgan, as administratrix) and R. McColgan. All of the material averments of the bill of complaint are put in issue by the answer of the defendants Daniel A. McColgan and R. McColgan. (Tr. pgs. 2, 26.)

The appellants filed separate affidavits, averring that Honorable William V. Van Fleet had a personal bias or prejudice against them and in favor of the plaintiff, Norvena Lineker. The affidavits were accompanied by the certificates of counsel of record that the affidavits and applications for the designation of another judge were made in good faith. (Tr. pgs. 140, 152.)

The plaintiff, Fred V. Lineker filed a so-called counter-affidavit which the court permitted to be

received over the objection of these appellants. (Tr. pg. 170.)

The motions were submitted to the court for its decision upon the affidavits of these appellants, and the counter-affidavit of the plaintiff Fred V. Lineker, and were denied by the court.

Specifications of Error.

On this appeal the appellants rely upon and intend to urge, the following errors which they assert were committed by the District Court, viz:

1. That the District Court and the judge thereof erred in denying appellants' motions to designate another judge, which motions were based on affidavits filed in pursuance of Section 21 of the Judicial Code.

2. That the District Court and the judge thereof erred in denying said motions and in holding that said affidavits did not sufficiently show bias and prejudice.

3. That the District Court and the judge thereof erred in holding and deciding that the said affidavits were not filed in time and in holding and deciding that the cause shown by appellants for not filing said affidavits prior to March 16, 1922, was insufficient.

4. That the District Court and the judge thereof erred in permitting the counter-affidavit

of the plaintiff Fred V. Lineker to be read at the hearing.

Brief of the Argument.

On this appeal the appellants maintain that the court erred in denying their motions for the designation of another judge. The argument will be made under two heads, viz:

1. The affidavits averring bias and prejudice were sufficient under Section 21 of the Judicial Code.

2. The cause shown by appellants as to why the affidavits were not filed before March 16, 1922, was sufficient under Section 21 of the Judicial Code.

The appellants also maintain that the court erred in permitting the counter-affidavit of the plaintiff to be read at the hearing.

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1. THE AFFIDAVITS AVERRING BIAS AND PREJUDICE WERE SUFFICIENT UNDER SECTION 21 OF THE JUDICIAL CODE.

The affidavits were filed and the motions made in pursuance of Section 21 of the Judicial Code which reads as follows:

> "(Jud. Code, Sec. 21). *Affidavit of Personal Bias or Prejudice of Judge.* Whenever a party to an action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be

tried or heard has a personal bias or prejudice, either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in Section 23 to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any cause to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The affidavit of the defendant Adelaide McColgan is as follows:

"City and County of San Francisco,
State of California,
Northern District of California,—ss.

Adelaide McColgan, being first duly sworn, deposes and says: That she is one of the defendants in the above-entitled action or suit; that af-

fiant is the administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and as such administratrix is one of the defendants in said action or suit; that the above-entitled action or suit was commenced during the lifetime of said Daniel A. McColgan and that said Daniel A. McColgan died on May 12th, 1921, and since the filing of the bill of complaint in the office of the Clerk of the above-entitled court; that by an order of the above-entitled court, affiant as the administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, was substituted in the place and stead of said Daniel A. McColgan, deceased; that Honorable William C. Van Fleet, before whom the above-entitled action is to be tried, has a personal bias or prejudice against affiant and in favor of the plaintiff Norvena Lineker; that said Honorable William C. Van Fleet has a personal prejudice against affiant, *that said Honorable William C. Van Fleet has a personal bias against affiant;* that said Honorable William C. Van Fleet has a personal bias in favor of the above-named plaintiff Norvena Lineker; that the facts and the reasons for the belief of affiant that such bias and prejudice exists are as follows: That in the month of October, in the year 1919, there was tried before said Honorable William C. Van Fleet, sitting as Judge of the above-entitled court, an action at law in which the plaintiffs herein were plaintiffs

and Mary J. Dillon and Thomas B. Dillon were defendants; that neither Daniel A. McColgan nor the defendant R. McColgan, nor any of the defendants herein, other than Mary J. Dillon, were parties or privies to said action at law; that said Daniel A. McColgan was a witness in said action at law and gave testimony at the trial thereof; that the trial of the above-entitled action (viz., the action or suit of Norvena Lineker, et al., against R. S. Marshall, et al.), was commenced in the above-entitled court before said Honorable William C. Van Fleet on the 20th day of January, 1922; that when said trial began the defendants asked permission of the Court to introduce evidence in support of the defendants' pleas of former adjudications of the controversy involved in the above-entitled action before the plaintiffs should be permitted to offer evidence in support of the allegations of the bill of complaint; that such permission was granted by the court, and the defendants thereupon introduced in evidence the judgment and judgment roll in an action pending in the Superior Court of the State of California, in and for the County of Stanislaus, entitled Frederick V. Lineker, plaintiff, against Daniel A. McColgan, R. McColgan Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife, defendants, and the judgment and judgment roll in an action pending in said Superior Court entitled R. S. Marshall and

Olive H. Marshall, plaintiffs, against Daniel A. McColgan, R. McColgan, and Eustace Cullinan, defendants; that pursuant to such permission the defendants also introduced in evidence the *remittitur* of the District Court of Appeal, for the Third Appellate District, affirming the judgment in said first mentioned action and also introduced in evidence certain briefs filed in said action in the said Superior Court and in the said District Court of Appeal; that the foregoing was all the evidence introduced by any of the parties to this action; that after the introduction of such evidence in support of said pleas of former adjudications, counsel for defendants and counsel for plaintiffs argued the question of law as to whether such judgment supported said pleas of former adjudications; that said argument was made on the 24th day of January, 1922; that at the conclusion of said argument and on said 24th day of January, 1922, said Honorable William C. Van Fleet made the following statements from the bench, viz.:

'The COURT.—I am satisfied from the impression made upon my mind by this argument, to which I have listened with a great deal of interest, that I would not be justified in proceeding at this time to the trial of the case on the merits. I want to examine this question for myself in the light of the authorities and in the light of the pleadings in the former cases, in the State Court; but I am very strongly impressed with

the fact that the contention is well taken. Mr. Taugher, I have heard you through now?

Mr. TAUGHER.—I was going to ask you a question.

The COURT.—Ask the question. What is it?

Mr. TAUGHER.—I was going to say, if your Honor would like to have them, that there are various points upon which I can supply authorities if your Honor would give me permission.

The COURT.—Oh, you ought to know that I never decide anything blindly when I can have information from either side. But the question, the principles involved in the doctrine of *res adjudicata* are very well settled and they do not proceed along the narrow lines that it seems to me counsel for plaintiffs would be inclined to desire to confine them. It is not a question of whether or not in all of its refinements the same precise matters have been litigated in their fullness in one case,—if they occur in another case and if the essential principles involved in the case at hand has in another action been adjudicated and under pleadings where the same substantive grounds may have or might have been adjudicated, although even not in their fullness, yet if the party had the opportunity in an action involving the same substantive rights to have those facts adjudicated and the judgment is in fact adjudicated on principles there presented, he cannot have another

day in court to re-litigate those fundamental principles.

Mr. TAUGHER.—Yes.

The COURT.—Now then, I am only suggesting this, of course, in a tentative way, because I am fully satisfied myself that this defense is not well taken, and I will be perfectly frank to say, because I have become so familiar with the facts underlying this whole transaction with reference to this woman's property, that it is a stench in the nostrils of any honest man, the manner in which this woman's property was taken from her originally. It was little less than downright robbery. And I have stated it before in the presence of those who are responsible, and I again insist upon it, that the evidence that they may have given in the past in courts of justice under certain circumstances, does not change my attitude at all, because in the case of Mrs. Lineker against Dillon and in the subsequent contempt proceedings the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion which should be based upon them; and therefore I desire if possible to reach the merits of this controversy. The character in which that occurred was brought out, was well illustrated, well evidenced upon the stand by one of the McColgans—I don't know whether it is the one that is still alive or the one that is dead—

Mr. TAUGHER.—He is dead.

The COURT.—Where he voluntraily made the suggestion that he felt—I don't remember exactly how he expressed it—but undoubtedly it was on his conscience that he had felt that perhaps there was something coming to Mrs. Lineker and that he had had that in mind to come to a settlement with her, although he said he had not.

Mr. TAUGHER.—Yes, your Honor—offered settlement with her for several thousand dollars.

The COURT.—Yes, I have forgotten. But underlying that declaration, which was forced from him undoubtedly by his conscience, was this history of a state of facts that should make any honest man blush. Therefore I say that if I can get away from this technical objection—technical in the sense that it does not involve the merits—I shall do so; but I frankly say to you now that I cannot see my way clear upon the presentation that has been had here, and it has been a very thorough one, of avoiding the objection that has been made here.

Mr. TAUGHER.—May we make a suggestion?

The COURT.—Mr. Taugher, what is your suggestion? I don't like to be interrupted or to be bombarded with questions after I have given my ruling.

Mr. TAUGHER.—Pardon me.

The COURT.—What is it you wish to suggest?

Mr. TAUGHER.—I was going to say that if after your Honor reads those pleadings and you are still not satisfied, if your Honor will give me permission then to write a little brief on the matter I will be glad to do it.

The COURT.—I don't believe for a moment, with the presentation that has been made here, that there will be any room for any further light to be cast upon it by counsel. I just want to look at these pleadings for myself and I believe that with my experience in the construction of pleadings that I will be just as well satisfied with my own construction as I would with the construction of counsel, when I decide. But, as I say, I am satisfied that I would not feel justified to go on with the merits of this case until this question has been definitely settled, because of my very strong view that it would not be possible to do so with the strong conviction I now have that the judgment—that the defense will have to be sustained. Now, of course, counsel at the bar is not responsible for this; I don't know who has been responsible; but this woman's rights have been butchered in the past, and in my judgment she had a fine property there and it has been gotten away from her. Happily for her she was enabled, through the efforts of one of the counsel in this case, to recover a very considerable quantity of her property that had been or its equavalent, taken from her. But that

this property to-day is worth a great *deal than* has been recovered back to her I do not doubt.

Mr. TAUGHER.—Worth a hundred thousand dollars.

Mr. PARTRIDGE.—What nonsense.

The COURT.—I will continue the case on the merits until I have been able to examine those questions for myself, with the hope, as I say, that I may be able to avoid this defense, but with the fear that I shall not be able to.

Mr. HARWOOD.—Has your Honor any objection to my handing you a memorandum on that matter containing the authorities?

The COURT.—No, sir, I don't wish any memorandum. I do not wish you to be heard in any further way than you have been.

Mr. HARWOOD.—I have handed counsel here this.

The COURT.—Well, hand it to the clerk—are you asking to file something?

Mr. HARWOOD.—No, that is the only idea I had.

The COURT.—Oh, yes, I am willing for you to offer anything that has been presented here.

Mr. TAUGHER.—I did not file any authorities. If you care to have me I will do so.

The COURT.—I think it might be well to have this argument written out. Have you been taking down this whole thing (Addressing the Reporter)?

The REPORTER.—Yes, and with the assistance of the documents and pleadings I can transcribe it.

The COURT.—I don't care anything about that. Give me the citations. The case on the merits is continued indefinitely until I have had opportunity to go into this matter. Is there anything else. This stands submitted on the feature of the defense, the question of *res adjudicata.'*

That the foregoing statements made by said Honorable William C. Van Fleet were taken down in shorthand by the official stenographic reporter of said court; that said Honorable William C. Van Fleet is designated in the foregoing statement by the words 'The Court'; that at the time the foregoing statements were made by said Honorable William C. Van Fleet no evidence had been offered or received in support of any of the issues in the above-entitled action except in support of the issues raised by the defendants' affirmative pleas of former adjudications; that said Honorable William C. Van Fleet believes that said Daniel A. McColgan robbed the said plaintiff Norvena Lineker and believes that said Daniel A. McColgan was a dishonest and unscrupulous man; that such belief on the part of said Honorable William C. Van Fleet is not based upon any evidence received in any action or proceeding in which said Daniel A. McColgan was a party or to which

said Daniel A. McColgan was privy, and is not based on any evidence received or introduced in the above-entitled action or suit; that if said Honorable William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on the part of said Honorable William C. Van Fleet will prevent said Honorable William C. Van Fleet from determining such issues with impartiality; that said Honorable William C. Van Fleet believes that said plaintiff Norvena Lineker was grievously wronged by said Daniel A. McColgan in the transaction described in the bill of complaint herein; that such belief on the part of said Honorable William C. Van Fleet is not based on any evidence received in any action or proceeding in which said Daniel A. McColgan was a party, or to which he was privy, and is not based on any evidence received in the above-entitled action or suit; that if said William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on his part will prevent him from determining such issues with impartiality; that said Daniel A. McColgan was not in fact dishonest or unscrupulous; that said Daniel A. McColgan never robbed, or defrauded, or took any undue advantage of said plaintiff Norvena Lineker, or of any other person; that said plaintiff Norvena Lineker was never wronged or defrauded by said Daniel A. McColgan, and that in all transactions between

said Daniel A. McColgan and said Norvena Lineker, said Daniel A. McColgan acted honestly and with good faith; that the reasons why this affidavit was not filed not less than ten days before the beginning of the term of the above-entitled court are as follows: That affiant did not at any time prior to the 24th day of January, 1922, know that said Honorable William C. Van Fleet had a personal prejudice or bias against affiant or a personal prejudice or bias in favor of said plaintiff Norvena Lineker; that on said 24th day of January, 1922, the said Honorable William C. Van Fleet ordered that the trial of the above-entitled action or suit be continued indefinitely until said Honorable William C. Van Fleet had an opportunity to determine the sufficiency of said pleas of former adjudications, and at the time of making said order, said Honorable William C. Van Fleet stated that he would try no cases at San Francisco until after the month of March as he would be engaged during the month of March in trying cases at the City of Sacramento; that the official stenographic reporter who took down the said statements of said Honorable William C. Van Fleet, as aforesaid, was not the regular stenographic reporter of said court, but was merely acting as such reporter on the 24th day of January, 1922, in the place of the regular stenographic reporter; that the stenographic reporter who took down said statements in short-

hand as aforesaid is named W. L. Flannery and is regularly employed as a stenographic reporter by the Railroad Commission of the State of California; that after the 24th day of January, 1922, Alfred J. Harwood, affiant's counsel herein, made diligent effort to communicate with said W. L. Flannery and on several occasions called at the office of the said Railroad Commission to see said W. L. Flannery, so that he would request said W. L. Flannery to transcribe his notes taken on the said 24th day of January, 1922, but affiant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California, acting as official stenographic reporter for the said Railroad Commission at hearings held at Eureka and said other places; that affiant's said counsel used reasonable diligence in making such request of said W. L. Flannery and used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922, as aforesaid; that affiant's said counsel was unable to obtain a transcript of said notes until the last week in the month of February, 1922; that on the said 24th day of January, 1922, said Honorable William C. Van Fleet did not continue the trial of the above-entitled action or suit to any definite day or term of said court, but continued the trial thereof indefinitely; that the

time for the trial of said action or suit has not yet been set.

Wherefore, affiant, the said defendant, prays that the Honorable William C. Van Fleet proceed no further in the above-entitled action, but another Judge shall be designated in the manner prescribed in Section 20 of the Judicial Code. or chosen in the manner prescribed in Section 23 thereof, to hear such matter.

Adelaide McColgan.

Subscribed and sworn to before me this 16th day of March, 1922.

[Seal] E. J. Casey,

Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL OF RECORD.

I, the undersigned, Alfred J. Harwood, counsel of record for the above-named defendant Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, do hereby certify that the foregoing affidavit and application are made in good faith.

Alfred J. Harwood,

Counsel of Record for said Defendant."

The affidavit of the defendant R. McColgan is substantially the same as the affidavit filed by the defendant Adelaide McColgan. (Tr. pg. 152.)

It is respectfully submitted that the affidavits clearly show bias and prejudice against these de-

fendants on the part of the judge. The judge has stated that the whole transaction between the defendants Daniel A. McColgan and R. McColgan and the plaintiff Norvena Lineker is a stench in the nostrils of any honest man and that it is little less than downright robbery. The judge has also stated that the entire transaction was developed before him in the action of *Lineker v. Dillon* in such a way as to leave no doubt as to the conclusion that should be based upon it. The judge has also stated that one of the McColgans in that case voluntarily made the suggestion that he felt that perhaps there was something coming to Mrs. Lineker and that he had it in his mind to come to a settlement with her, but that he had not done so. The judge has said that this statement on the part of McColgan was forced from him undoubtedly by his conscience, and that underlying that declaration was a history of a state of facts that should make any honest man blush. The judge also stated that if he could get away from the technical objection (the pleas of *res judicata*) he should do so. The judge has also stated that Mrs. Lineker's rights have been butchered and that he would examine the question as to the pleas of *res judicata* with the hope that he might be able to avoid this defense.

It is apparent that Judge Van Fleet believes that the McColgans defrauded Mrs. Lineker. *This belief is not based on any testimony taken at the trial of this suit or at any trial where the McColgans were parties or where they had their day in court,*

or where they had the right to cross-examine witnesses or to show their side of the transaction, but is based on testimony taken in a case to which the McColgans were neither parties nor privies.

In the suit the McColgans are charged with fraud and it is incumbent upon the chancellor who tries the cause to find whether or not these charges of fraud are sustained by the evidence.

It is respectfully submitted that the case of Berger v. United States, 255 *U. S.* 32, *is decisive here.* In that case the affidavit averred that the judge was prejudiced against the affiant because he was born in Austria. The affidavit quoted certain statements impugning the loyalty of Germans and German Americans that the judge had made with reference to Germans and German Americans generally. The Supreme Court held that this affidavit sufficiently complied with Section 21 of the Judicial Code.

Referring to the affidavit required by that Section, Mr. Justice McKenna said:

> "Of course the reasons and facts for the belief the litigant entertains are an essentail part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants is of that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward these defendants."

In the above case the Supreme Court held that when an affidavit is filed pursuant to Section 21 of

the *Judicial Code* it becomes the duty of the judge to pass upon its sufficiency under that Section, and that, if it is sufficient, he is obliged to designate another judge.

The Supreme Court further held that the averments of the affidavit could not be contradicted by other affidavits. After quoting Section 21 of the *Judicial Code,* Mr. Justice McKenna said:

> "There is no ambiguity in the declaration, and seemingly nothing upon which construction can be exerted,—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed, and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred and, in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another.
>
> But it is said that there is modification of the absolutism of the quoted declaration in the succeeding provision that the 'affidavit shall state the facts and reasons for the belief' of the existence of the bias or prejudice. It is urged that the purpose of the requirement is to submit the reality and sufficiency of the facts to the judgment of the judge, and their support of the averment or belief of the affiant. It is in effect urged that the requirement can have no other purpose; that it is idle else, giving an automatism to the affidavit which overrides everything. But this is a misunderstanding of the requirement. It has other and less extensive use, as pointed out by Judge Meek in

> *Henry v. Speer, supra.* It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury. Nor do we think that this view gives room for frivolous affidavits."

In reply to the contention of the Solicitor General that the affidavit in the *Berger* case was founded upon "opinions, beliefs, rumors or gossip" and that it was made on information and belief, Mr. Justice McKenna further said:

> "We do not know what counsel means by 'opinions, beliefs, rumors, or gossip.' The belief of a party the section makes of concern, and if opinion be nearer to or farther from persuasion than belief, both are of influence, and universally regarded as of influence, in the affairs of men, and determinative of their conduct; and it is not strange that Paragraph 21 should so regard them.
>
> We may concede that Paragraph 21 is not fulfilled by the assertion of 'rumors or gossip,' but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, and the value of averments on information and belief in the procedure of the law is recognized. To refuse their application to Paragraph 21 would be arbitrary and make its remedy unavailable in many, if not in most, cases."

Mr. Justice McKenna further said:

> "We are of opinion, therefore, that an affidavit upon information and belief satisfies the section, and that, upon its filing, if it show the objectionable inclination or disposition of the

judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? of what concern to other parties to have him so preside? and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.

Our interpretation of Paragraph 21 has, therefore, no deterring consequences, and we cannot relieve from its imperative conditions upon a dread or prophecy that they may be abusively used. They can only be so used by making a false affidavit; and a charge of, and the penalties of, perjury, restrain from that,—perjury in him who makes the affidavit, connivance therein of counsel. thereby subjecting him to disbarment. And upon what inducement and for what achievement? No other than trying the case by one judge rather than another, neither party nor counsel having voice or influence in the designation of that other; and the section, in its care, permits but 'one such affidavit.'

But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, we must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate, we can only deal with it as it is expressed, and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial,—free, to use the words of the section, from any 'bias or prejudice' that

> might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that, upon the making and filing of the affidavit, the judge against whom it is directed 'shall proceed no further therein, but another judge shall be designated in the manner prescribed in Paragraph 23 to hear such matter.'
>
> And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exist, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

In the *Berger* case Judge Landis permitted to be filed a stenographic report of the remarks made by him. This stenographic report showed that the remarks actually made were essentially different from the remarks quoted in the affidavits of the defendants. In holding that the stenographic report should not be considered by the court, the Supreme Court said:

> "After overruling the motion of plaintiffs for his displacement, Judge Landis permitted to be filed a stenographic report of the incident and language upon which the motion was based. We, however, have not discussed it, because, under our interpretation of Paragraph 21, it is excluded from consideration."

Mr. Justice Day in his dissenting opinion said:

> "It does not appear that the trial Judge had any acquaintance with any of the defendants, only one of whom was of German birth, or that he had any such bias or prejudice against any of them as would prevent him from fairly and impartially conducting the trial."

With reference to the construction of Section 21 of the Judicial Code, Mr. Justice Reynolds (who also dissented) said:

> "Of course no Judge should preside if he entertains actual personal prejudice towards any party and to this obvious disqualification Congress added honestly entertained belief of such prejudice when based upon fairly adequate facts and circumstances."

The situation here is as follows: These defendants are before a court of equity charged with fraud. It is incumbent upon the chancellor to determine whether these charges of fraud are sustained by the evidence. *Before one word of evidence has been received, the chancellor states, in effect, that he believes the defendants have ben guilty of the very fraud charged against them in the plaintiffs' bill of complaint. The chancellor has stated that his belief is based upon evidence received in an action at law to which action at law these defendants are strangers. It is respectfully submitted that it would be impossible to present a more clear case of bias and prejudice and that if the statute is construed not to apply in such a case then the statute is meaningless.*

There are a number of cases (such as *State v. Bohan,* 19 Kan. 28, which hold bias and prejudice is not shown where at a former trial of a criminal case (where the jury and not the judge passes on the facts) a judge at the conclusion of the case, in sentencing the defendant, expressed himself as believing in the defendant's guilt. Such bias or prejudice (if it can be called bias or prejudice at all) may be said to be bias or prejudice in the case, for in those cases the judge has heard the evidence and the defendant has had his day in court, *and the statements made by the judge in sentencing the defendant were made in the orderly course of judicial procedure and were based on the finding of the jury.*

But, it is respectfully submitted, no case will be found which holds that a chancellor is not biased or prejudiced where the facts are at all similar to those shown in the affidavits on file herein. On the contrary, the authorities are all the other way, and in many cases it is intimated that a *very much weaker showing of bias and prejudice than is her presented would be sufficient to sustain the charge of bias and prejudice.*

Assume that in *Berger v. U. S.,* 255 U. S. 32 *supra,* the trial judge had said at a hearing on a demurrer to the indictment that he believed Berger to be disloyal. *Would not that fact more clearly show prejudice and bias than the facts stated in Berger's affidavit?* And yet such a statement made at the hearing of the demurrer might be called "prejudice in the cause." It is respectfully submitted that the

test is not whether the statements showing prejudice or bias are made in the cause in which the charge of prejudice or bias is made. The test must be: *Do the statements made by the judge, whether made in the cause or in some other case, show prejudice or bias?* Of course there is a clear and well recognized distinction between statements made by a judge after the hearing of evidence in a cause and statements made before he has heard the evidence.

It is respectfully submitted that this is a much stronger case than *Berger v. United States, supra. Here the judge passes upon the facts; there the facts were passed upon by a jury. Here the feeling on the part of the judge is directed against the defendants personally; there the feeling was against a class of which the defendant Berger was not even a member, some of the other defendants, jointly impleaded with Berger, being members of that class. Here the judge has come in contact with the defendants; there the judge was wholly unacquainted with Berger and had never come in contact with him.*

In *Massie v. Commonwealth,* 20 S. W. 704 (Ky.), the Court of Appeals of Kentucky held that an affidavit setting forth that after a former trial of a criminal case, at which trial the jury disagreed, the judge expressed his opinion of the guilt of the defendant, showed prejudice on the part of the judge.

In *Estudillo v. Security Loan Co.,* 158 Cal. 70. after the trial and judgment and pending proceedings on a motion for a new trial, the party against

whom the judgment was rendered filed an affidavit of bias and prejudice under Section 170 of the Code of Civil Procedure. Referring to the affidavit, the Supreme Court said:

> "We do not deem it necessary to set forth the averments of the affidavits upon which plaintiffs relied to support this motion. If they contained any statements tending to show bias on the part of the judge, these statements were fully met by counter affidavits. The finding of the trial judge on conflicting affidavits is conclusive on appeal, even though the question in controversy be the disqualification of the judge himself. (Swan v. Talbot, 152 Cal. 142 (94 Pac. 238).) The uncontradicted matter consisted merely of a recital of the proceedings prior to and during the trial, in the course of which Judge Oster made a number of rulings adversely to the plaintiff's contentions. We are not prepared to concede that all or any of these rulings were erroneous. But if it be assumed that in each of them the trial court committed error, that fact alone would not be sufficient to show bias on his part. *The record is devoid of the slightest indication that Judge Oster had any relations, outside of the trial, with any of the parties, that he entertained any feelings of hostility or friendship toward any of them, or that he had, except in the course of orderly judicial procedure, given utterance to any expressions concerning the merits of the case.*"

Here is a direct intimation that had the judge had any relations with either of the parties, outside of the trial, or had he, other than in the course of orderly judicial procedure, given utterance to any

expressions concerning the merits of the case, there would have been a sufficient showing.

In the case at bar the judge came in contact with the plaintiff Norvena Lineker and the McColgans outside of the trial, and he has expressed himself on the merits of the instant case without hearing the evidence.

In *People v. Findley,* 132 Cal. 304, the defendant's affidavit stated that the judge, at a former trial, had stated that he had no doubt as to the defendant's sanity. Referring to this affidavit the Supreme Court said:

> "Insanity being set up as a defense, if the judge had wantonly, and without any occasion for it, announced in the presence of the jury that he had never had any doubt as to the defendant's sanity, this might indicate that he was not disposed to give the defendant a fair trial; but the affidavit does not give us the full proceedings in reference to this matter; it does not state what was said by defendant's counsel, in his opening statement or elsewhere, to call forth any remark from the court as to the sanity of defendant. The exact language of court and counsel was undoubtedly taken down by the court reporter at the time, and this, or its substance, should have been presented at the hearing of the motion. In the absence of a showing to that effect, it will not be presumed that the court made the remark without any call for it. The only proper occasion, that occurs to us, that the court would have to announce that he never had any doubt as to defendant's sanity would be in response to a suggestion on the part of defendant's attorney that his client was then insane, and a demand that the question of his

> then present sanity be tried before a jury called specially for that purpose, in accordance with the provisions of section 1368 of the Penal Code. It would be no evidence of prejudice in the judge, for him to declare, in response to a demand of this nature, that he had no doubt as to the sanity of defendant; and if counsel desired that the declaration should not be made in the presence of the jury, he should not call for the ruling in their presence, but should request the court to direct them to retire."

In *McEwen v. Occidental Life Ins. Co.,* 172 Cal. 6, 10, the affidavit stated that at a former trial of the case the judge had made the following statement:

> "I will entertain a motion for a new trial upon the minutes of the Court at any convenient time. I do not see how the Jury could possibly have reached this verdict."

In this case the judge (pursuant to the California law) filed an affidavit disclaiming bias and prejudice. The Supreme Court said:

> "This affidavit (the Judge's affidavit) was, in itself, sufficient to overcome the very meager showing made by the plaintiff in her effort to establish prejudice on the part of the judge. It makes little difference, therefore, whether Mr. Thompson's affidavit was, strictly speaking, admissible or not.
>
> "Plaintiff's affidavit shows that after ruling against her in the first trial Judge Wood granted her motion for a new trial; that an appeal was taken by her opponent; and that she prevailed over that opponent in the court of appeal. We fail to see how these facts indicated any bias or prejudice on the part of the judge. On the contrary, they evidenced a desire to do

justice which caused the judge frankly to admit that his ruling in granting the nonsuit was incorrect. Next we find that the plaintiff feared she would not be fairly treated on the second trial; but her state of mind is not evidence. She complains that the judge generally decided against her on objections made by her counsel but she does not show, nor even assert, that such rulings were not generally justified. Three of the four rulings of which she makes specific complaint seem to have been reversed by the court of its own motion. We refer to those by which the privileged communications made by deceased to three physicians were first admitted and then stricken out. Surely these things do not indicate prejudice. On the contrary, they exhibit a desire on the part of the court to be fair. Erroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review. (Estudillo v. Security Loan etc. Co., 158 Cal. 66 (109 Pac. 884); Burke v. Mayall, 10 Minn. 287; State v. Bohan, 19 Kan. 28; Stahl v. Schwartz, 67 Wash. 25 (120 Pac. 856); Bell v. Bell, 18 Idaho 636 (111 Pac. 1074); State v. Barnett, 98 S. C. 422 (82 S. E. 795).) Nor are a judge's expressions of opinion, uttered in what he conceives to be the discharge of his judicial duty, evidence of bias or prejudice. (State v. Bohan, 19 Kan. 28; State v. Crilly, 69 Kan. 802 (77 Pac. 701); Ex parte N. K. Fairbank Co., 194 Fed. 978; Epstein v. United States, 196 Fed. 354 (116 C. C. A. 174).)

"The vexation of the judge, and his remark that he did not know how the jury could possibly have reached such a verdict, does not show prejudice against Mrs. McEwen. These things indicated perhaps that he had formed an opinion regarding the legal questions which had been presented in the case and in reference to

> the sufficiency of plaintiff's proof. *Such conviction in the mind of the judge, based upon his actual observation of the witnesses, the hearing of their testimony,* and his knowledge of the law applicable to such cases does not amount to that prejudice against a litigant which the statute contemplates as a basis for change of venue. (Western Bank of Scotland v. Tallman, 15 Wis. 92, 104)."

In *Western Bank v. Tallman,* 15 Wis. 101 (cited by the California Supreme Court), the court held that the fact that the judge had formed an opinion upon the legal questions involved in the case did not show prejudice.

In *Moses v. Julian,* 84 Am. Dec. 122 (N. H.), the court, with reference to prejudice and bias on the part of a judge, said:

> "Under this head falls the class of cases where the Judge has a bias or prejudice in favor of or against one of the parties. Such bias, caused by hearing an *ex parte* statement of the facts of a case, would be a disqualification to try it. A Judge anxiously on his guard to hear nothing of the cases which may come before him except what is said in Court and in the presence of the adverse party, may yet find that he has been imposed upon by artful statements designed to create a judgment in his mind relative to the case. In such a case he may well decline to sit in the case."

In this case Judge Van Fleet had heard what is tantamount to an *ex parte* account of the transactions which are the basis of this suit, and has been influenced thereby adversely to these defendants.

In *Commonwealth v. Webster,* 59 Mass. 295, 297, the court said:

> "The word 'prejudice' in a statute making the prejudice of a juror a ground of challenge, seems to imply nearly the same thing as 'opinion' a prejudgment of the case, and not necessarily an enmity or ill will against either party. * * * It must be such an opinion upon the merits of the question as would be likely to bias or present a candid judgment upon a full hearing of the evidence."

In *Hungerford v. Cushing,* 2 Wis. 397, 405, it was said:

> "Under a statute providing for a change of venue on the ground of prejudice of the judge trying the cause, the term 'prejudice' does not mean an opinion formed beforehand upon the questions of law involved in the case, *but an opinion or judgment in regard to the case, formed beforehand without examination, or a prepossession."*

In *Hinkle v. State,* 21 S. E. 595, 600, the court said:

> "Prejudice means a prejudging of a case from any cause. It means a settled and fixed opinion, either as to the guilt or innocence of an accused, no matter from what cause that opinion is derived or upon what it is based."

In *Hudgins v. State,* 2 Ga. 173, 176, the court said:

> "Bias is that which sways the mind toward one opinion rather than another . . . One whose opinion is preconceived and expressed is inclined to that side, and some evidence is

necessary before these impressions can be removed and his mind restored to the straight line of indifference."

In *State v. Board of Education,* 52 Pac. 319, (Wash.), the court said:

"While some courts have decided that the tests of the respective qualifications of judges and jurors are not the same, yet in a case of this kind, where the judges pass upon the facts, we see no good reason why the test of qualification should be different."

In the above case the court also said:

"To compel a litigant to submit to a judge who has already confessedly prejudging him, and who is candid enough to announce his decision in advance, and insist that he will adhere to it no matter what the evidence may be, would be farcical and manifestly wrong."

In *Wharton Cr. Law,* (Sec. 2945), the author says:

"The practice among the civilians extends the right of challenge for cause to the judges as well as the jurors; and the great inclination of authority is that the same causes which disqualify one disqualify the other. Where the judge, like a chancellor, sits to try both fact and law, as in the case with the civilians, there is peculiar reason for the application to him of a jealous test."

In *Chenault v. Spencer,* 68 S. W. 128, (Ky.), the affidavit of one of the parties stated that the judge had said that affiant had no right to the land in controversy, and had criticized the decision of the

court of appeals in affiant's favor. Held, that the judge was disqualified by reason of bias and prejudice.

Section 21 of the Judicial Code was enacted in 1912. It is remedial and should be liberally construed. It received such liberal construction in the case of *Berger v. United States, supra.* All that the statute requires is that the facts stated shall reasonably support the claim of bias and prejudice.

As pointed out by Mr. Justice Reynolds in his dissenting opinion in *Berger v. United States, supra,* it is not the actual personal prejudice of the judge against the party which is contemplated by Section 21 of the Judicial Code, *but the honestly entertained belief of such prejudice on the part of the litigant when such belief is based upon fairly adequate facts and circumstances.* These defendants have this belief, and this belief is supported by the certificate of their counsel of record as required by the Statute. How can it be said the facts and circumstances stated in the affidavits do not afford a fairly adequate basis for this belief?

In California, before 1897, bias and prejudice on the part of the judge were not grounds for changing the judge, but in 1897, Section 170 of the Code of Civil Procedure was amended so as to make prejudice or bias such grounds. The California cases decided under the law as it existed before 1897, are, of course, not applicable here. Nor are the cases in many states (notably Texas) where

bias and prejudice are not recognized by statute as a ground.

In addition to the foregoing authorities, the following may be cited:

Works v. Superior Court, 130 Cal. 304;
Morehouse v. Morehouse, 136 Cal. 332;
Bassford v. Earl, 162 Cal. 115, 119;
State v. Fullerton, 183 Pac. 979 (Okla.).

The word "prejudice" is defined by *Webster's International Dictionary* as follows:

> "Prejudice—Preconceived judgment or opinion; leaning toward one side of a question from other considerations than those belonging to it; prepossession; unreasonable predilection for, or objection against, anything; esp. an opinion or leaning adverse to anything without just grounds or before sufficient knowledge."

The word is derived from the prefix "pre" and the word "judge."

"Bias" is defined by the same authority as follows:

> "Bias—a leaning of the mind; propensity or prepossession toward an object or view, not having the mind indifferent . . . prejudice."

At the hearing in the District Court, counsel for plaintiffs cited the case of

Ex parte N. K. Fairbanks Co., 194 Fed. 978, (District Court.)

The affidavit in that case was frivolous in the extreme. It did not in the slightest degree tend to

show bias or prejudice against the N. K. Fairbanks Co.

Referring to the affidavit filed, the District Judge said:

> "The only reason stated as a fact, and not alleged on information and belief, to show personal bias or prejudice between the parties, is the correspondence between the presiding judge and Judge Shelby, which is made an exhibit to the petition and refers to the application made to the Circuit Judges to designate another judge to try the case. *No reference whatever was made to the merits of the litigation, or preference expressed between the parties, or intimation of any kind given either as to the law or the facts of the case.*" (Page 991.)

In *Ex parte N. K. Fairbanks, supra,* the District Judge had written a letter to the Circuit Judge containing a very mild criticism of one of the attorneys (who was not the attorney of record) of the N. K. Fairbanks Co. In this letter, the attorney was criticized for complaining to the Circuit Judge that the case had been delayed. The attorney had filed a petition with the Circuit Judges of the Fifth Circuit, asking that a judge be assigned to try the case on the ground of the alleged delay. One of the Circuit Judges sent a copy of the petition to the District Judge, together with a letter, and it was in reply to this letter that the District Judge mildly criticized the attorney who had filed the petition with the Circuit Judges.

Counsel for plaintiffs at the hearing before Judge Van Fleet quoted the following extract from the

opinion of the District Court in the case of *Ex parte N. K. Fairbanks Co., supra*:

> "Common sense and the authorities alike teach that such expressions of opinion by a judge in the discharge of duty, concerning either the conduct of a litigant or its attorney, are not evidence of personal prejudice or bias as to either."

This statement of the court was made with reference to the mild criticism of the party's attorney.

Furthermore, the decision of the District Court in *Ex parte N. K. Fairbanks,* 194 Fed. 978, *supra,* has been overruled by the Supreme Court of the United States on nearly every point decided. The District Court in that case held that the affidavit could not be made on information or belief, and also held that if Section 21 of the Judicial Code was construed to mean that the mere filing of an affidavit, stating facts reasonably supporting the charge of bias and prejudice, required the judge to be changed, then the Section was unconstitutional. In both of these particulars the decision of the District Court was overruled by the Supreme Court in *Berger v. U. S.*, 255 U. S. 32.

At the hearing counsel for plaintiffs cited *Emporia v. Volmer,* 12 Kan. 627. Under the law of Kansas (as appears from the opinion in the case cited), it must be clearly shown that there exists a prejudice on the part of the judge against the defendant. It was not sufficient that a *prima facie* case be shown "such a case as would require the sustaining of a challenge to a juror." And under

the law of Kansas, where the application was denied, the reviewing court should sustain the trial court "on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged." Obviously the case has no application to a case arising under Section 21 of the Judicial Code, as construed by the Supreme Court in *Berger v. U. S.*, 255 U. S. 32, *supra.*

At the hearing counsel for plaintiffs stated that "It further appears from the very statements disclosed by the affidavits that the court expressly says he feels that he will have to sustain the plea of *res judicata*" and that "Clearly this shows that there could be no personal prejudice or personal bias affecting a hearing on the merits."

Just how the statement of the judge quoted above in any way lessens the effect of the statements concerning the merits of the case, was not pointed out by counsel.

Counsel for plaintiffs also made the point that the other defendants have not filed affidavits under Section 21. But that fact is wholly immaterial.

In *Henry v. Speer,* 201 Fed. 869, 871, cited by plaintiffs at the hearing, a reference had been made to the master in chancery in an equity suit in which Henry was a party. In Henry's affidavit it was averred that the judge "was biased and prejudiced against deponent's (the plaintiff) right to recover." The affidavit stated that the judge had rendered an opinion "in which practically every issue was prejudged and determined by said judge." The opin-

ion was rendered in pursuance of the discharge of the official duty of the judge. The opinion itself is not printed in the report of the case in 201 Federal, but presumably it merely stated the judge's conclusions on matters of law or fact that had been submitted to him for his decision. The affidavit in the above case did not state that the judge had any personal prejudice or bias against the affiant, but merely a prejudice against the affiant's "right to recover."

Contrast that case with the case at bar. There the judge had heard a preliminary matter in the cause and in deciding that preliminary matter had rendered an opinion adverse to the plaintiff's contentions. The opinion was rendered in discharge of the official duty of the judge, and doubtless related to the matter which had been submitted to him for his decision. And if the opinion went beyond the law of the case and referred to the facts, doubtless such reference to the facts was called for by the nature of the matter that was submitted to the court for its decision. Moreover, if any reference was made to the facts, it was a reference based upon the facts as they were made to appear to the court in the action in which the opinion was filed. In that case the judge had never come in contact with the litigant outside of the case. But in the case at bar the statements made by the judge had no reference to the plea of *res judicata,* which had been submitted to him for his decision. Nor were the statements based upon any evidence which had been introduced in the pending cause but were based on

evidence introduced in a cause in which these defendants were strangers. They were based on a contact with these defendants outside of the case. Moreover, the statements made in this case show an extremely strong feeling on the part of the judge that these defendants have been guilty of gross fraud in the very matters which are the basis of the bill of complaint.

In plaintiffs' points and authorities filed at the hearing before Judge Van Fleet, it was said that

> "a judge's expressions of opinion, uttered in which he conceives to be the discharge of his judicial duty, are not evidence of bias or prejudice,"

and in support of this statement the case of *State v. Bohan,* 19 Kan. 28, and other cases are cited. In that case *State v. Bohan,* the judge, at the conclusion of the trial of a criminal case, and a verdict of guilty by the jury, expressed himself as believing in the defendant's guilt. As pointed out in the first part of this brief the statements made by the judge were made in the ordinary course of judicial procedure, and were based on the jury's verdict of guilty.

A case where, after hearing the evidence, the judge criticizes the conduct of a party, is in no respect similar to a case where a party's conduct is harshly criticized before any evidence is received and where the criticism is based upon a contact with the party wholly outside of the case. Furthermore, it is respectfully submitted, in no sense can the statements quoted in the affidavits on file be

deemed to have been made in the discharge of the judicial duty of the judge.

It may be noted that the statements of Judge Landis under consideration in *Berger v. U. S., supra,* were actually made in the discharge of his judicial duty in the case where the statements were made. They were made in sentencing a person who had been convicted of violating the Espionage Act.

Epstein v. U. S., 196 Fed. 354, cited by plaintiffs at the hearing, has no relation to Section 21 of the Judicial Code, but involved a claim that the judge was concerned in interest in the prosecution or had been of counsel for the prosecution.

In *State v. Crilly,* 69 Kan. 802, cited by plaintiffs at the hearing, the judge merely stated that he intended to see that the laws regulating the liquor traffic were enforced and that in the event that persons charged with the violation of such laws were found guilty, he would see that the sentences imposed by the court were enforced. Referring to this statement, the Supreme Court of Kansas said:

> "It is apparent that what the judge said with regard to his action to be taken in the future was based upon the contingency that the defendants, in the event of their conviction, should seek to evade the effect of the judgment of the court by the artifice described. It indicates no personal bias against the defendant, but a purpose that the efficacy of any sentence that might be pronounced should not be defeated by sub-

> terfuge. At least, it does not so clearly show a prejudice as to require a reversal."

Moreover, as shown by the case of *Emporia v. Volmer,* 12 Kan. 627, *supra,* the Kansas statute bore an entirely different construction from that placed upon Section 21 by the United States Supreme Court.

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2. THE CAUSE SHOWN BY APPELLANTS AS TO WHY THE AFFIDAVITS WERE NOT FILED BEFORE MARCH 16, 1922, IS SUFFICIENT UNDER SECTION 21 OF THE JUDICIAL CODE.

In denying the applications of the appellants for the designation of another judge the court in its opinion said that the affidavits were not filed in time.

Section 21 of the Judicial Code requires that the affidavit

> "shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file within such time."

In this case the affidavits were filed less than ten days before the beginning of the term of the court, but it is respectfully submitted, good cause was shown for the failure to file within the time specified in Section 21.

The statements made by Judge Van Fleet were made on January 24th *after the trial had begun.* They were made after the submission of pleas of

res judicata made by these defendants and the other defendants in the case. The affidavits were filed on March 16th. The cause shown for the filing at this time is as follows:

> "That the reasons why this affidavit was not filed not less than ten days before the beginning of the term of the above entitled court are as follows: that affiant did not at any time prior to the 24th day of January, 1922, know that said Honorable William C. Van Fleet had a personal prejudice or bias against affiant or a personal prejudice or bias in favor of said plaintiff Norvena Lincker; that on said 24th day of January, 1922, the said Honorable William C. Van Fleet ordered that the trial of the above entitled action or suit be continued indefinitely until said Honorable William C. Van Fleet had an opportunity to determine the sufficiency of said pleas of former adjudications, and at the time of making said order, said Honorable William C. Van Fleet stated that he would try no cases at San Francisco until after the month of March as he would be engaged during the month of March in trying cases at the City of Sacramento; that the official stenographic reporter who took down the said statements of said Honorable William C. Van Fleet, as aforesaid, was not the regular stenographic reporter of said court, but was merely acting as such reporter on the 24th day of January, 1922, in the place of the regular stenographic reporter; that the stenographic reporter who took down said statements in shorthand as aforesaid is named W. L. Flannery and is regularly employed as a stenographic reporter by the Railroad Commission of the State of California; that after the 24th day of January, 1922, Alfred J. Harwood, affiant's counsel herein, made diligent effort to communicate

with said W. L. Flannery and on several occasions called at the office of the said Railroad Commission to see said W. L. Flannery so that he could request said W. L. Flannery to transcribe his notes taken on the said 24th day of January, 1922, but affiant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California, acting as official stenographic reporter for the said Railroad Commission at hearings held at Eureka and said other places; that affiant's said counsel used reasonable diligence in making such request of said W. L. Flannery and used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922, as aforesaid; that affiant's said counsel was unable to obtain a transcript of said notes until the last week in the month of February, 1922; that on the said 24th day of January, 1922, said Honorable William C. Van Fleet did not continue the trial of the above entitled action or suit to any definite day or term of said court, but continued the trial thereof indefinitely; that the time for the trial of said action or suit has not yet been set." (Affidavit of R. McColgan, Tr. pgs. 162-163.)

None of the foregoing averments is denied in the counter affidavit on file, and it is merely averred therein that the court adversely ruled on defendants' pleas of *res judicata* before the affidavits were filed. (Affidavit of F. V. Lineker, Tr. pg. 170.)

But the fact of this adverse decision on the plea of *res judicata* pending the time the appellants were preparing their affidavits does not in any way show

that the appellants were not diligent in preparing and filing the affidavits.

The purpose of the provision requiring the affidavit to be filed not less than ten days before the beginning of the term of the the court *is to prevent delay in the trial of the case. This was so held by the Supreme Court in Berger v. United States, supra.* In view of the indefinite continuance of the trial of the case no harm resulted or could have resulted from the delay. The affidavits were filed in March and the judge had stated, in indefinitely postponing the trial of the cause, that he would try no cases at San Francisco until after March. Even if there had been no other good reason for the delay the fact of the indefinite continuance of the trial would be sufficient excuse.

Where, as here, it is shown that the delay in filing the affidavit could not have delayed the trial, it necessarily follows that the delay was immaterial.

It must be conceded that these defendants and their counsel had a reasonable time after January 24th within which to consider the advisability of filing affidavits of bias and prejudice and within which to obtain from the stenographic reporter a transcript of the statements made by the judge, and within which to consider the effect of the statements, and within which to prepare the affidavits. The affidavits allege that counsel for these defendants used reasonable diligence in obtaining the transcript of the notes of the stenographic reporter and the facts showing the reason for the delay are fully set forth

in the affidavits. None of these averments is denied. It follows, therefore, that the affidavits are filed in time, unless the showing made by the affidavits is insufficient, when taken in conjunction with the further fact that the judge had set aside the submission of the pleas of *res judicata* before the affidavits were filed.

But, it is respectfully submitted, the fact of such ruling does not militate against the showing made by these defendants. The mere fact that the ruling was made while counsel for these defendants was using reasonable diligence in the matter, cannot be controlling.

It must be borne in mind that Section 21 is remedial and is to be "liberally construed so as to promote the object of the legislature by suppressing the mischief and advancing the remedy". (36 *Cyc.* p. 1174, title "Statutes".) Congress deemed that it was not just that an action should be tried by a judge who was biased or prejudiced against one of the parties. It is respectfully submitted that in construing Section 21, the court should hold that an affidavit showing bias and prejudice is filed in time unless the contrary clearly appears.

It is contended by counsel for plaintiffs at the hearing of these motions before Judge Van Fleet, that when the statements were made by the judge on January 24th, counsel for these defendants should have objected or excepted, and it has also been suggested that at such time, counsel for these

defendants should have stated that it was his intention to file affidavits of bias and prejudice.

But, it is respectfully submitted, why was counsel called upon to decide so important a matter without having time for reflection and an opportunity to read carefully the statements made by the judge? In this case, counsel for these defendants called several times on the stenographic reporter who took down the notes on January 24th, in order to request that these notes be transcribed, but due to the absence of the stenographic reporter from San Francisco, counsel was unable to obtain a transcript of these notes until the last week in February. On January 24th the trial of the cause had been continued indefinitely and the judge had stated that he would try no cases in San Francisco in March. Surely, after obtaining the transcript counsel was entitled to a reasonable time to consider it and to prepare the affidavits. In view of the indefinite continuance and the statement of the judge that no cases would be tried in March, there was no occasion for haste in the filing of the affidavits.

It has been suggested in the counter affidavit filed by Fred V. Lineker, that counsel waited until the court ruled on the plea of *res judicata* and that if a ruling favorable to these defendants had been made, the affidavits would not have been filed.

But the showing made in the affidavits negatives any such intent. It is there alleged that

> "after the 24th day of January, 1922, affiant's counsel herein made diligent effort to communicate with said W. L. Flannery so that he

> could request said W. L. Flannery to transcribe his notes taken on the said 24th day of January".

It is further averred that affiant's counsel succeeded in obtaining such notes in the last week of February. All of this negatives the idea that the matter was being delayed until after a ruling.

In this case counsel did not, as did counsel in the *Berger* case, prepare an affidavit containing an incorrect or distorted statement of the remarks of the trial judge, but care was taken to obtain from the official reporter a *verbatim* report. *And the delay in filing the affidavits was due to the delay in obtaining this verbatim report.*

Furthermore, it is respectfully submitted, even if the affidavits had stated that their filing was delayed pending a ruling on the pleas of *res judicata* they would not on that account be filed beyond the time allowed by law. The matter submitted to the court on January 24th was a question of law, and the submission was made prior to the statements showing bias and prejudice. For all practical purposes it was similar to the submission of a demurrer. Let us assume that upon the demurrer to the bill of complaint the judge has expressed himself as he did on January 24th. In such a case, would these defendants have lost the right to file an affidavit of bias and prejudice merely because they waited for the court to rule on the demurrer? The statute does not bear such a construction. If it did, a litigant (if he knew of the facts showing bias or prejudice)

could not wait until the cause was at issue on the facts, but would be obliged to file his affidavit forthwith.

The pleas of *res judicata* had been submitted to the judge before he made the statements set out in the affidavits. These pleas raised questions of law and these defendants could not have prevented the court's deciding such questions of law.

A ruling on a preliminary question of law, such as is raised by a plea in abatement, can work no substantial injury to a party against whom the judge is prejudiced. What the party in such case has the right to fear is a ruling by the Chancellor on questions of fact submitted on conflicting evidence.

Assuming, for the sake of argument, that these defendants had purposely waited for a ruling on the pleas of *res judicata* before filing the affidavits, it may be asked, what harm could have been done thereby? If the ruling had sustained the pleas, the affidavits would not have been filed as there would be no necessity to file them, for in that case the judge would not be called upon to find upon the issues of fact raised by the bill of complaint and the answer of these defendants. In such event, the bias and prejudice would be immaterial. This would not be a case where the defendants voluntarily submitted the plea to the decision of the court, after knowledge of the facts which it is claimed show bias or prejudice, but would be a case where the plea was submitted before such knowledge was acquired. The filing of an affidavit

of bias and prejudice is an unpleasant duty for counsel to perform and if he should delay filing such affidavit, with the hope that a ruling may make its filing unnecessary, his clients should not lose their rights thereby, unless some injury has resulted from the delay.

I have examined the *Century Digest,* including the latest annuals, to find some authority which would be applicable here, but have been unable to find that a situation at all similar has arisen in any adjudicated case. There are a number of cases which hold that a party, *with knowledge of the facts upon which the claim of disqualification is based,* cannot invoke the jurisdiction of the court to pass on a motion or other preliminary matter in the cause and after an adverse ruling file an affidavit of bias and prejudice. *Johnson v. Bowling,* 205 S. W. 927, 930, is such a case. In that case the defendants received knowledge of the facts on February 24th. On March 24th they demurred to the jurisdiction of the court. Three months after the court had decided adversely to defendants the question of jurisdiction, and four months after defendants obtained knowledge of the facts, the affidavit alleging disqualification was filed. In that case the defendant, with knowledge of the facts, had voluntarily made and submitted a plea to the court, and after this plea was decided adversely to him, he filed an affidavit setting up that the judge was disqualified. No excuse was offered for the delay in filing the affi-

davit. Obviously, the above case does not present a situation like that which is now presented to this court.

In *State v. Superior Court,* 180 Pac. 481 (Wash.), it was held that the filing of a motion to make the complaint more definite and certain after knowledge of the facts on which the claim of bias and prejudice was based, did not preclude the party making the motion from subsequently filing an affidavit of bias and prejudice. In so ruling the court said:

> "They (the relators) are objecting only to the right of the respondent as a person to pass upon the merits of the case."

In the above case the court also said that the statute "is a remedial statute and must be liberally construed".

In Re Equitable Trust Co. of New York, 232 Fed. 836 (C. C. A.), illustrates the rule that a party should not be permitted to make a motion in a pending suit and while the motion is pending undetermined file an affidavit of bias and prejudice less than ten days after the beginning of the term. In that case the District Court had ruled that the affidavit was not filed in time, and that it did not state facts showing bias or prejudice. The Circuit Court of Appeals (on petition for writ of mandamus) refused to pass upon these questions, but denied the petition for a writ of mandamus on the ground that the petitioner's motion that the judge proceed

with the entry of a decree was still pending before him and that

> "the action of the trial Judge thus set in motion and continuously prosecuted before him by the petitioner itself cannot, we think, be thus paralyzed".

State v. Morgan, 77 So. 592, is also an example of a case where the party by submitting a question to the decision of the court with knowledge of the facts, is held to be precluded from afterwards making objection. In that case the court said:

> "In this case it appears that the defendant had submitted a preliminary plea to the Judge for decision on the same morning when he filed his motion for recusation; and the Judge had ruled on the plea when the motion for recusation was filed. *The defendant did not in his motion for recusation allege that he came to the belief that the Judge was prejudiced against him after he had submitted the preliminary issues to the Judge for decision."*

Although the matter is not involved here, it does not seem that, under Section 21, a party by making preliminary motions and taking other proceedings, prior to the term of the court in which the case is to be tried on the merits, waives his right to file an affidavit of bias and prejudice. It would seem that he could file such affidavit within ten days prior to the beginning of the term in which the case is to be tried, wholly irrespective of his having submitted demurrers and other preliminary motions and pleas to the judge. Under the statutes in many states,

however, the submission of such preliminary pleas with knowledge of the facts on which the alleged bias or prejudice is based is deemed a waiver of the right to object to the judge's trying the case.

It is respectfully submitted, that no authority will be found to support the contention that the affidavits of these defendants were not filed in time. All the cases where it has been held that the affidavits were not filed in time involved facts essentially different from those existing in this case.

The situation here is very different from a case where, during the progress of the trial of a cause on the merits, a party received knowledge of facts showing that the judge was biased and prejudiced against him and with the knowledge of such facts submitted the cause to the judge for his decision, and, after an adverse decision, filed an affidavit of bias and prejudice. There are a large number of cases of this kind, where it has been held that the affidavits of bias and prejudice were filed too late.

This is clearly a case where the defendants had the right to file their affidavits after January 24th, when the statements were made by the judge. I maintain that there was never presented to a court affidavits which more clearly show bias and prejudice than those on file in this case. Assuming that the affidavits show bias and prejudice, they must be given the effect provided for by statute, unless it clearly appears that they were not filed in time. And, it is respectfully submitted, they must be

deemed to have been filed in time unless there was unreasonable delay in filing them.

Assuming that the affidavits show bias and prejudice entitling these defendants to the remedy provided for by Section 21 of the Judicial Code, then the objection here is, in effect, that the defendants have waived the right to ask for that remedy. In 23 *Cyc.* 597, title "Judges", the author says:

> "The right to object on account of prejudice is waived by making a motion in the cause."

The waiver of a legal right will never be presumed and a party will not be held to have waived a legal right unless his acts, which it is claimed constitute the waiver, are unequivocal. Waivers are not favored in the law. (40 *Cyc.*, title "Waiver".)

The pleas of *res judicata* had been submitted to the court before the statements were made by the judge. This is not a case where a litigant submits a plea or motion with the knowledge of the facts showing bias or prejudice. These defendants, after the submission of the pleas, were in no position to ask the court not to rule thereon because of the statements made by the judge after the submission. They had the right to obtain a transcript of the statements made by the judge and, upon obtaining this transcript, their counsel had time to consider the effect of the statements and to prepare the affidavits. All that could be reasonably required of these defendants is that they should file their

affidavits before the trial was resumed or any further question submitted to the court for its decision. Under the circumstances here shown, it should be held, it is respectfully submitted, that the showing as to the cause of the delay is entirely sufficient under Section 21 of the Judicial Code.

In this case the affidavit is clearly sufficient under Section 21 of the *Judicial Code.* When such an affidavit is filed less than ten days before the beginning of the term and cause is shown therein for the delay in filing, it could not have been the intention of the statute that the judge should have any discretion in regard to designating another judge, provided the cause shown for the delay was *prima facie* sufficient. If the statute were otherwise construed the very purpose for which it was enacted would be subverted. (*Vide* opinion of the Supreme Court in the *Berger* case.) Under such circumstances the judge should not pass on questions of fact which might be raised by a counter affidavit but should confine himself to deciding whether or not, as a matter of law, the cause shown is sufficient. However, in this case the counter affidavit did not deny any of the material averments of the affidavits of appellants, or any of the averments showing cause for filing the affidavits at the time they were filed but merely averred that before the affidavits were filed the court had decided adversely to appellants on their plea of *res judicata.*

In his opinion filed at the time of the making of the order appealed from, Judge Van Fleet made certain statements which are not based upon the record. In the foregoing part of this brief I have fully set forth the showing made by appellants as to the reason the affidavits were not filed until March 16th and also the fact set out in the affidavit of the plaintiff, Fred V. Lineker, that before the affidavits were filed the court had ruled adversely on the plea of *res judicata*. These were the only matters which were before the court at the hearing. But in his opinion Judge Van Fleet makes the statement that in 1919 at the trial of the action at law of *Lineker v. Dillon,* he "gave voice to expressions substantially similar to those complained of here, both of the McColgans being in court at the time". This statement is not based upon any evidence presented to Judge Van Fleet at the hearing by affidavits or otherwise, and is directly at variance with the record which shows that these appellants did not know of the personal bias or prejudice of Judge Van Fleet until January 24, 1922, when the statements set out in the affidavits were made. (Affidavit of R. McColgan, Tr. pg. 162; Affidavit of Adelaide McColgan, Tr. pg. 149.)

The proceedings at the time the affidavits were read are set forth in the Transcript at pages 176-181.

Even if the record had shown (which it does not) that Judge Van Fleet made the same statements in 1919 that he made on January 24, 1922, that fact

would not show that the affidavits were not filed in time. In the first place all of the statements showing bias and prejudice set out in the affidavits herein could not in the nature of things have been made in 1919. Some of the most significant statements made by Judge Van Fleet on January 24, 1922, were the following:

> "That the evidence they have given in the past in Courts of Justice under certain circumstances does not change my attitude at all, because in the case of *Lineker v. Dillon* the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion that should be based upon them; and, therefore, I desire, if possible, to reach the merits of this controversy * * *. Therefore, I say, that if I can get away from this technical objection (the plea of *res judicata*)—techinical in the sense that it does not involve the merits—I shall do so * * *. I will continue the case on the merits until I have been able to examine those questions, with the hope, as I say, that I may be able to avoid the defense, but with the fear that I shall not be able to do so." (Affidavit of Adelaide McColgan, Tr. pp. 144-146.)

Even if these defendants had known that Judge Van Fleet had harshly criticized them in 1919, in the case of *Lineker v. Dillon,* those statements could not have been coupled with the statements quoted above which show that the bias or prejudice on the part of Judge Van Fleet was so strong that the judgments in favor of the defendants rendered in the state courts, one of which was affirmed by the

District Court of Appeal (*Lineker v. McColgan,* 36 Cal. App. Dec. 559), "did not change his attitude at all" and that he hoped to be able to overrule the pleas of *res judicata* in order that he could try the issues as to the alleged fraud. Nothing that Judge Van Fleet could have said in 1919, before this suit was begun, could have given these defendants ground for the belief that he had prejudged this suit, and had made up his mind, in advance of hearing their side of the case, to render judgment against them.

Moreover, even if Daniel A. McColgan in 1919 had heard Judge Van Fleet criticize him as severely as he did on January 24, 1922, the administratrix of his estate, who has been substituted in his place as a party, would not be charged with the knowledge of Daniel A. McColgan as to such statements. When the administratrix learned for the first time on January 24, 1922, that the judge was biased and prejudiced, she had the undoubted right to the remedy provided by Section 21 of the Judicial Code. Undoubtedly as to property rights an administratrix is bound by the acts and knowledge of the decedent, but with reference to the conduct of a case in court she has the same right to the remedy provided by Section 21 as she would have to any other right conferred by law upon a party litigant. The fact that the decedent may have known that the judge was biased and prejudiced against him could not prevent the administratrix from objecting when *she* became aware of the bias and prejudice.

As shown above, the statement made by Judge Van Fleet in his opinion to the effect that in the case of *Lineker v. Dillon,* in 1919 he made statements regarding the McColgans substantially similar to those made by him on January 24, 1922, is wholly unsupported by the record in this case. If substantially similar statements were made, the plaintiffs in their counter affidavit should have so averred, but the counter affidavit is silent on the subject.

Since Judge Van Fleet made his order refusing to designate another judge I have obtained a copy of the official reporter's transcript of the testimony given in the case of *Lineker v. Dillon,* and have carefully read it to ascertain what was said by Judge Van Fleet at the trial of the case of *Lineker v. Dillon.* In that case while Daniel A. McColgan was on the witness stand Judge Van Fleet merely stated to him that he had no right in the world to claim the title to the property covered by the deed of trust by purchasing in the certificate (a sheriff's certificate of sale) because he was obliged under the trust deed to protect the title. The District Court of Appeal in *Lineker v. McColgan*, 36 Cal. App. Dec. 559, held that nothing in the deed of trust prevented Mr. McColgan from purchasing the adverse title. This statement by Judge Van Fleet showed no bias or prejudice, but was merely a statement of his view of the law. There is no statement here that the transaction "was a stench in the nostrils of any

honest man'' or that it ''was little less than downright robbery''. Nor is there any statement that underlying the declaration of Mr. McColgan that he felt there was something coming to Mrs. Lincker ''was this history of a state of facts that should make any honest man blush''.

The court erred in permitting the counter-affidavit of the plaintiff, Fred V. Lincker, to be read. These defendants objected to the reading of this affidavit and the objection was based on the decision of the Supreme Court in *Berger v. United States,* 255 U. S. 32 *supra.* (Tr. pg. 179.)

The only part of this affidavit which was any way material was the part which averred that the pleas of *res judicata* had been decided by the court before the date of the filing of the affidavits averring bias and prejudice.

It is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with instructions to the presiding judge to designate another judge for the trial of the cause.

Dated, San Francisco,
February 10, 1923.

ALFRED J. HARWOOD,
Attorney for Appellants.

No. 3964

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADELAIDE MCCOLGAN, as administratrix with the will annexed of the estate of Daniel A. McColgan, and R. MCCOLGAN,

Appellants,

vs.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as administrator of the estate of Norvena Lineker, deceased, the plaintiffs in a suit pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of said Court) and R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON, (formerly Mary J. Tynan), EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

BRIEF FOR APPELLEES, FREDERICK V. LINEKER, AND FREDERICK V. LINEKER, AS ADMINISTRATOR OF THE ESTATE OF NORVENA LINEKER, DECEASED.

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Outline of Brief

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FREDERICK V. LINEKER and FREDERICK V. LINEKER, as administrator of the estate of Norvena Lineker, deceased, the plaintiffs in a suit pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of said Court) and R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON, (formerly Mary J. Tynan), EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

BRIEF FOR APPELLEES, FREDERICK V. LINEKER, AND FREDERICK V. LINEKER, AS ADMINISTRATOR OF THE ESTATE OF NORVENA LINEKER, DECEASED.

The Fact Situation.

The trial of this suit in the court below commenced January 22nd, 1922. A defensive plea of *res judicata* was interposed by the now complaining appellants and other defendants below. The state trial court record and briefs, in support of said motion were introduced, and arguments had on said motion before the trial court January 24th, 1922. At the close of the argument, when the colloquy between court and counsel ensued, and the comments of the court now objected to were made, counsel for appellants, Adelaide McColgan and R. McColgan, was personally present in court. At that time no objections were then and there interposed by any of the counsel for any of the defendants, and no exceptions then and there taken to any alleged improper remarks of the trial judge. The decision of the trial court on said plea of *res judicata* was under submission for over six weeks. (Record, 184, 188.) Immediately after the denial of the plea of *res judicata,* the present affidavits charging personal bias and prejudice were filed. On the hearing of said motion to disqualify and after due consideration, the said motion was denied. (Record, 189.) From said ruling this present appeal is now before this court.

THERE IS NO SUCH PERSONAL BIAS AND PREJUDICE SHOWN BY THE AFFIDAVITS FILED WHICH MEET THE SITUATION REQUIRED UNDER SECTION 21 OF THE UNITED STATES JUDICIAL CODE.

None of the defendants other than the McColgans are appellants on this appeal, nor have any of the counsel for the other nine defendants in the court below filed any briefs nor taken any part in this appeal. The integrity of the trial court is attacked only by the two litigants now appealing from the order denying their motion to disqualify the trial judge. If their said plea of *res judicata* had been sustained, the case could not have proceeded to trial on the merits.

Prior to the commencement of trial January 22nd, 1922, none of the defendants below filed any affidavits charging personal bias or prejudice on the part of the court. In the *Berger* case, 255 U. S. 32, relied on by the appellants, it appears that an attack had been made upon Judge Landis, charging personal bias and prejudice and that the affidavits making said charges were filed prior to the commencement of the trial.

The remarks made by the trial judge and now complained of merely touch on the testimony of Daniel A. McColgan, now deceased, in the *Dillon* case previously tried before the same court. (Record, 178.) The remarks objected to, we believe, are mere expressions concerning another case which had nothing to do with the merits of the present case whatsoever. The judge says he did not know the McColgan brothers. (Record, 178.) The passing

comments of the court made during argument of counsel, we believe, indicate to any reasonable mind that there was absolutely no such personal bias or prejudice in the mind of the trial judge which would preclude him from giving a perfectly fair and impartial trial to all of the defendants. In the case of *Ex Parte N. K. Fairbank Co.*, 194 Fed. 978, at 990, quoting from Justice Brewer in the case of *Emporia v. Volmer*, 12 Kans. 627, which discusses the elements requisite for an attack on the ground of personal bias and prejudice, it is said:

> "That such facts and circumstances must be proved by affidavits, or other extrinsic testimony, as clearly show that there exists a prejudice on the part of the judge towards the defendant, and unless this prejudice clearly appears, a reviewing court will sustain an overruling of the application on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged. It is not sufficient that a prima facie case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial judge's integrity and the clearness of his perceptions."

Measuring the charges made in defendant's affidavits by the foregoing citation, we feel we have a right to consider the following excerpts from said defendant's affidavits, to-wit:

From the Adelaide McColgan affidavit:

> "The COURT. I am satisfied from the impression made upon my mind by this argument, to which I have listened with a great deal of in-

> terest, that I would not be justified in proceeding at this time to the trial of the case on the merits. I want to examine this question for myself in the light of the authorities and in the light of the pleadings in the former cases, in the State Court; but I am very strongly impressed with the fact that the contention is well taken." (Record, 142, 143.)

After discussing the *Dillon* case and that the court desired to get away from the technical objection—technical in the sense that it does not involve the merits, the court continues:

> * * * "but I frankly say to you now that I cannot see my way clear upon the presentation that has been made here, and it has been a very thorough one, of avoiding the objection that has been made here." (Record, 145.)

Then after further discussion by the court concerning the rights of Mrs. Lineker and what had happened to her in the past, but without discussing any of the questions involving the merits of the present suit, the court continues:

> "I will continue the case on the merits until I have been able to examine those questions for myself, with the hope, as I say, that I may be able to avoid this defense, but with the fear that I shall not be able to." (Record, 146.)

That after further discussion between the court and counsel concerning the filing of authorities, the court concludes:

> "The case on the merits is continued indefinitely until I have had opportunity to go into this matter. Is there anything else? This

> stands submitted on the feature of the defense, the question of *res adjudicata.*" (Record, 147.)

The foregoing excerpts clearly show that the court is impartially passing upon matters submitted to it on the pleas raised by the defendants themselves. That they are submitting to the jurisdiction of the court, without any objection or exception then and there being taken by counsel representing any one or more of the defendants.

> "Common sense and the authorities alike teach that such expressions of opinion by a judge in the discharge of duty, concerning either the conduct of a litigant or its attorney, are not evidence of personal prejudice or bias as to either, and such comments and expressions have never yet been held, either in law or morals, to unfit a judge to try a case in which such observations have been made."
>
> *Ex Parte Fairbank,* supra, page 992.

The proceedings disclosed by the affidavits (Record, 143-145) merely show the comments of the court as to certain features of the *Dillon* case long since tried, and show that the court stated it did not feel justified to go on with the merits until the question of *res adjudicata* had been definitely settled. In said *Fairbank* case, supra, at page 997, we find the following:

> "It is not proof or evidence of the unfitness of a judge in a particular case that an honest but suspicious suitor, or a vicious and dishonest one, swears that he cannot obtain justice before him. Such an affidavit proves only the animus or belief of the man who makes it. It does not prove partisanship or personal preju-

> dice or bias in the judge. If the judge is not biased or prejudiced in fact, a false allegation or imputation that he is, made in the affidavit of a litigant, cannot change the actual mental or moral status of a judge or unfit him to try a particular case. Affidavits cannot change a pure and impartial judge into a bad official. It is the existence of bias or prejudice, and not the charge, whether honestly or dishonestly made, which constitutes the disqualification. A man by an ex parte affidavit may conclude his own rights or destroy his own reputation, but he can never conclude the rights of others or impose a discreditable status upon a public official by his mere statement of that which does not exist, however solemnly alleged in an ex parte affidavit. To hold otherwise would be to strike down a great principle of justice, which cannot be abandoned without destroying the very foundations of our jurisprudence."

And at page 1000 in said case we find:

> "The inherent powers of courts and judges set up to administer the judicial power of the United States have always been held to include ample authority to protect them against insult and assault, whether by physical violence or contumelious behavior and words, and it has been held time and again that the possession of such powers is essential to their independence and well being."

In the *Berger* case, Judge Landis had criticized the conduct of certain German citizens during the Great War and the objection to the judge presiding at the trial as a result of his remarks was made prior to the trial. In this appeal the charges go to mere comment made by the court concerning a prior suit, during the discussion of a controverted ques-

tion of law after the trial was commenced. It further appears from the very statements disclosed by the affidavits of Adelaide and R. McColgan that the court expressly says he feels that he will have to sustain the plea of *res judicata*. This being so, it is clearly evident from the facts that the appellants, feeling confident of their position, raised no objections, took no exceptions to the remarks of the court, submitted themselves to the jurisdiction of the court, but after an adverse decision then came into court and for the first time filed their attack on the trial judge.

In *Ex parte American Steel Barrel Co.*, 230 U. S. 35, at 43, Mr. Justice Lurton, in discussing this question of personal bias and prejudice says:

> "The bias of the disqualification (referring to Sec. 21) is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

And in *Henry v. Speer,* 201 Fed. 869, at 871, the court says:

> "Section 21 has to do with the personality of the judge before whom the suit is to be tried and rights established. It is remedial in its nature, that is, it is meant to afford relief from adventitious predicaments which fair minded men recognize should be relieved against, when they in fact exist."

Referring to the affidavit in this case (p. 872) the court says:

> "Its perusal reveals the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner, but rather a prejudgment of the merits of the controversy and 'against deponent's right to recover.' Section 21 is not intended to afford relief against this situation."

A judge's expressions of opinion, uttered in what he conceives to be the discharge of his judicial duty, are not evidence of bias or prejudice.

Epstein v. U. S., 196 Fed. 354, at 355;
State v. Bohan, 19 Kan. 28;
State v. Crilly, 69 Kan. 802;
Ex parte N. K. Fairbank Co., 194 Fed. 978.

We believe that timely objection should have been taken and exceptions interposed if the defendants below and appellants here are to be permitted to successfully raise the question now presented to the court under all the facts and circumstances in this

present suit, for, as stated in *Denver v. Home Savings Bank,* 200 Fed. 28:

> "The office of an exception, in practice, is to challenge the correctness of the rulings or decisions of the trial court promptly when made, to the end that errors in such rulings may be corrected by the court itself, if, upon its attention being called thereto, it deems them to be erroneous; and to lay the foundation for their review, if necessary, by the proper tribunal. In the courts of the United States such an exception, taken immediately upon the ruling being made, is indispensable to a review by the proper Appellate Court on the ruling."

See also

Railway Company v. Heck, 102 U. S. 120;
Potter v. United States, 122 Fed. 49.

APPELLEES COULD NOT KNOW WHAT THE APPELLANTS WERE DOING DURING THE FORTY OR MORE DAYS FOLLOWING THE SUBMISSION OF THE PLEA OF RES JUDICATA WHEN NO INTIMATION HAD BEEN GIVEN EITHER TO THE COURT OR TO THE APPELLEES THAT SAID APPELLANTS WERE OBJECTING TO THE REMARKS OF THE COURT BELOW, BUT ON THE CONTRARY THEIR MOTION HAD BEEN SUBMITTED WITH EVERY INDICATION BY THE TRIAL COURT THAT THE PLEA OF RES JUDICATA WOULD HAVE TO BE SUSTAINED.

We believe this statement sufficiently answers the arguments advanced in the brief for appellants that no counter affidavit has been filed to that portion of the appellants' affidavits setting forth their reasons why their objections were not filed prior to the time

they were presented in the said affidavits charging personal bias and prejudice. Not having information appellees could not in the very nature of things answer that portion of said appellants' affidavits.

ATTITUDE OF APPELLANTS.

The attitude of appellants, we believe, as disclosed from the record and their briefs on this appeal, reveals more of an assumption that there was personal prejudice and bias on the part of the trial court, rather than any real facts supporting the contentions advanced by them. We here quote a few excerpts from their brief:

> (Page 19.) "It is apparent that Judge Van Fleet believes that the McColgans defrauded Mrs. Lineker."
>
> (Page 32.) "In this case, Judge Van Fleet had heard what is tantamount to an *ex parte* account of the transactions which are the basis of this suit, and has been influenced thereby adversely to these defendants."
>
> (Page 41.) "Moreover, the statements made in this case show an extremely strong feeling on the part of the judge that these defendants have been guilty of gross fraud in the very matters which are the basis of the bill of complaint."
>
> (Page 59.) "Nothing that Judge Van Fleet could have said in 1919, before this suit was begun, could have given these defendants ground for the belief that he had prejudged this suit and had made up his mind, in advance of hearing their side of the case, to render judgment against them."

And again, same page:

> "When the administratrix learned for the first time on January 24, 1922, that the judge was biased and prejudiced, she had the undoubted right to the remedy provided by Section 21 of the Judicial Code."

These statements do not coincide with the attitude of appellants in sitting by mute, submitting their plea of *res judicata* for decision, remaining supine for six weeks or more thereafter, and then after an adverse ruling, immediately filing their affidavits charging personal bias and prejudice on the part of the trial court to which jurisdiction they had submitted themselves for a decision on their pleas of *res judicata.*

On page 60 of said brief, we also find certain *ex parte* statements by counsel as to matters *de hors* the record, which have no place in this appeal.

Conclusion.

We conclude with the following portion of the oral opinion of the trial judge, commencing with page 186 of the record:

> "Upon this hearing it appeared that the subject matter upon which the Court's alleged bias and prejudice is now predicated first arose in the case of Norvena Lineker v. Mary J. Dillon, et al., involving another phase of the same controversy tried before the court in 1919 and in which Daniel A. McColgan testified as to his relations to the property of Norvena Lineker during which trial the Judge first gave voice to ex-

pressions (157) substantially similar to those complained of here—both of the McColgans being in court at the time. It was further made to appear at the hearing that the Judge had absolutely no personal acquaintance with either Daniel A. McColgan or R. McColgan and was unable to distinguish them by their names and, as then stated by the Judge, any idea or sentiment of personal bias or prejudice against the McColgans had never entered his mind but that all that had been expressed by him and now made the subject of complaint was based solely and alone upon impressions made upon his mind by the testimony in the case of Lineker v. Dillon given by Daniel A. McColgan as to his participation in the transaction there involved and that the Judge was not now aware of any sentiment or feeling that would preclude him from giving a fair and impartial trial to the issues involved in this cause as to all the defendants.

"Assuming that the application has been made in good faith I think it sufficient to say that the facts do not in my judgment afford a sufficient basis to work a disqualification under Section 21 of the Code. In the first place by its very terms the section negatives the idea that a party may sit by after having the claimed disqualifying circumstances brought directly to their knowledge months before the term and let the cause go to trial without interposing the objections. The disqualifying affidavit must be filed ten days before the term 'unless good cause be shown for the failure'; and this cause must appear on the face of the affidavit. Here the substantive evidence of the claimed bias and prejudice had been presented to the complaining defendants as early as the trial of Lineker v. Dillon in 1919, and there is nothing to excuse the delay. If it be claimed that the disqualification (158) was disclosed for the first time upon the statement made by the Judge on the

submission of the question of *res judicata* the defendants are in no better position since it appears that they sat mute under that statement without objection or suggestion and permitted the cause to be taken under submission and held for over six weeks before decision and then moved only when the conclusion of the Judge was not what they had hoped. A party cannot be permitted to thus sit silent and gamble on a favorable result and, losing out, attempt for the first time to assert his right. I am satisfied the assertion of the right claimed here came too late to justify its recognition.

"But there is another and deeper reason for denying the application. A consideration of the section under which the claim is made shows at once that the mere assertion of a bias or prejudice on the part of a Judge is insufficient to work a disqualification. There must be a statement of the facts tending to show such state of mind; and obviously those facts must be such as would reasonably be calculated to disclose the existence of the disqualifying attitude specified in the Statute.

"The facts stated in these affidavits wholly fail to meet that requirement. 'Personal' bias or prejudice cannot properly be said to arise from views formed in the mind of a Judge, however freely expressed, founded upon sworn testimony in a cause before him upon which he is called upon to pass. If it were otherwise no Judge would be qualified to re-try a cause upon which he had been required to pass where for any reason the judgment first entered had to be set aside and the cause reheard. This is not the meaning of the statute.

"For these reasons the application is denied."

There is an inherent weakness in the contention that the expressions of the trial judge alluded to,

indicate bias and prejudice against appellants, in this, that the remarks objected to, constitute an expression of a *judicial* opinion as contradistinguished from a *personal* opinion. Judge Van Fleet merely indicated the impression made upon his mind as a judge by certain evidence given in the trial of the former *Dillon* case. Any opinion which he may have formed from testimony introduced under the issues of that case, was essentially a judical opinion; that is, it was an opinion and a conclusion reached in the exercise of his judicial functions. Such an opinion or state of mind can never constitute personal bias and prejudice within the meaning of the statute. If it could be regarded as constituting personal bias and prejudice, then a judge must always of necessity, by reason of the opinions formed and conclusions reached from the evidence in the trial of a given case, become disqualified under the statute, from presiding in any subsequent case to which the losing parties or discredited witnesses are parties.

It is respectfully submitted that the order of the trial court denying appellants' motion for designation of a judge other than Honorable William C. Van Fleet to try said case, should be affirmed.

Dated, San Francisco,
March 3, 1923.

Respectfully submitted,

WM. F. ROSE,
JOHN L. TAUGHER,
Attorneys for said Appellees.

No. 3964

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADELAIDE McCOLGAN, as administratrix with the will annexed of the estate of Daniel A. McColgan, and R. McCOLGAN,

Appellants,

vs.

FREDERICK V. LINEKER, et al.,

Appellees.

ORAL ARGUMENT OF ALFRED J. HARWOOD IN REPLY TO BRIEF OF FREDERICK V. LINEKER, APPELLEE.

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ORAL ARGUMENT OF ALFRED J. HARWOOD IN REPLY TO BRIEF OF FREDERICK V. LINEKER, APPELLEE.

* * * * * * *

Mr. HARWOOD: I shall now reply to certain contentions made in the brief of the appellee. Most of the contentions there made were anticipated in my opening brief, but there are a few statements made in the brief to which I would like to reply.

At page 3 of appellees' brief the following statement is made:

> "The remarks objected to, we believe, are mere expressions of opinion concerning another case which had nothing to do with the merits of the present case whatsoever."

It will be sufficient in answer to this contention to quote the following excerpts from the affidavits filed by these appellants, where it is averred that Judge Van Fleet made the following statements:

> The COURT. Now then, I am only suggesting this, of course, in a tentative way, because I am fully satisfied myself that this defense is not well taken, and I will be perfectly frank to say, because I have become so familiar with the facts underlying this whole transaction with reference to this woman's property, that it is a stench in the nostrils of any honest man, the manner in which this woman's property was taken from her originally. It was little less than downright robbery. And I have stated it before in the presence of those who are responsible, and I again insist upon it, that the evidence that they may have given in the past in courts of justice under certain circumstances, does not change my attitude at all, because in the case of Mrs. Lineker, against Dillon and in the subsequent contempt proceedings the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion which should be based upon them; and therefore, I desire if possible to reach the merits of this controversy. The character in which that occurred was brought out, was well illustrated, well evidenced upon the stand by one of the McColgans—I don't know whether it is the one that is still alive or the one that is dead—where he voluntarily made the suggestion that he felt—I don't remember exactly how he expressed it—but undoubtedly it was on his conscience that he had felt that perhaps there was something coming to Mrs. Lineker and that he had had that in mind to come to a settlement with her, although he said he had not.

> Mr. TAUGHER. Yes, your Honor—offered settlement with her for several thousand dollars.
>
> The COURT. Yes, I have forgotten. But underlying that declaration, which was forced from him undoubtedly by his conscience, was this history of a state of facts that should make any honest man blush. Therefore I say that if I can get away from this technical objection—technical in the sense that it does not involve the merits—I shall do so.

At page 4 of their brief counsel for the appellee quote from the decision of the Kansas Supreme Court in the case of *Emporia v. Vollmer,* 12 Kans. 627, where the Court said:

> "a reviewing court will sustain an overruling of the application on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged. It is not sufficient that a *prima facie* case only be shown, such a case as would require the sustaining of a challenge to a juror."

Counsel must know that this case is not authority under Section 21 of the Judicial Code. This case was referred to in my brief at page 38, where I pointed out that it had no application at all under Section 21 of the Judicial Code, as construed by the Supreme Court in *Berger v. U. S.,* 255 U. S. 32. Under Section 21 of the Judicial Code we are not at all concerned with what the judge might be "personally conscious" of. And under Section 21 is it necessary only that the affidavit shall

> "*give fair support to the charge of a bent of mind that may prevent or impede impartiality*

> *of judgment.*". (Opinion of Mr. Justice McKenna in the *Berger* case.)

At page 6 of their brief counsel cite the case of *Ex parte Fairbanks,* 194 Fed. 978 (D. C.). This case is also referred to in my brief at page 36. In the case cited the district judge in a letter to the circuit judge mildly criticized one of the attorneys of the Fairbanks Company for complaining to the circuit judge that the trial of the case had been delayed. Referring to this letter, the District Court in its opinion said:

> "No reference whatever was made to the merits of the litigation, or preference expressed between the parties, or intimation of any kind given either as to the law or the facts of the case." (Page 991.)

There is nothing in *Ex parte Fairbanks* which supports the ruling of Judge Van Fleet in the case at bar. Moreover, as pointed out in my brief at page 38 the case of *Ex parte Fairbanks* has been overruled by the United States Supreme Court on nearly every point decided.

Counsel say these defendants should have excepted to the statements made by Judge Van Fleet on January 24th. Such is not the proper occasion for an exception. "Exception" is defined by *Bouvier* as

> "Objections made to the decision of the Court in the course of a trial."

These statements made by Judge Van Fleet were not decisions and had nothing whatever to do with

the pleas of *res judicata* which had been submitted to him for his decision. That this was no place for taking an exception is shown by the very case of *Denver v. Home Savings Bank,* 200 Fed. 28, cited by counsel at page 10 of their brief.

With reference to the contention that the affidavits were not filed in time counsel say that appellees

> "could not know what the appellants were doing during the forty or more days following the submission of the pleas of *res judicata.*"

The cause shown for the delay in the filing of these affidavits is very complete. It is set out in full at pages 44 and 45 of my brief. *Every averment made is an averment of a fact—not one of these facts were denied by the affidavit filed by the plaintiff.* It is alleged in the affidavits that the stenographic reporter who took down the statements of the judge was regularly employed by the railroad commission and that after January 24th he was at Eureka and other places in California acting as stenographic reporter for the railroad commission. It is further averred that

> "Alfred J. Harwood, appellants' counsel, made diligent effort to communicate with said W. L. Flannery and on several occasions called at the office of the railroad commission to see said W. L. Flannery so that he could request said W. L. Flannery to transcribe his notes, but that appellant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California."

It is further averred that affiants' said counsel used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922.

No attempt is made to deny any of these allegations.

As pointed out in my brief, Judge Van Fleet on January 24th continued the trial of the case indefinitely. The continuance was not to any definite day or term. These facts are shown by the affidavits.

I respectfully submit that a sufficient showing was made, and that if any of the facts averred were not true the plaintiff could have denied them. And if the plaintiff had no information or belief upon the subject he could likewise have denied them on that ground.

The continuance of the case to no certain date or term of the Court, in itself, would be a sufficient *prima facie* showing to justify the filing of the affidavits at the time they were filed.

In this connection it may be noted that the judge did not rule on the motions to disqualify until August 21, 1922, which was over five months after the affidavits were filed. (Tr. p. 181.)

Counsel refer to the statement of the judge that he felt he would have to sustain the pleas of *res judicata* and say that this statement indicates the alleged impartiality of the judge. The other statements of the judge show that he is strongly partial

and that his mind is not indifferent as between the parties. The mere fact that he felt that as a matter of law he would have to sustain the pleas of *res judicata* is immaterial. He also said he hoped he could see his way clear to overrule them. The statement of the judge that he felt he would have to sustain the pleas and the further statement that he hoped he could see his way clear to overrule them, clearly show, in themselves (and wholly independent of the other stronger statements), that the judge is not impartial.

In passing it may be noted that the judge's hope that he could see his way clear to overrule the pleas of *res judicata* was in fact realized.

As pointed out at page 56 of my brief, the filing of an affidavit which shows bias and prejudice on the part of the judge precludes the judge from performing any act other than ruling on the legal sufficiency of the affidavit and (if the affidavit is not filed within ten days prior to the beginning of the term) ruling on the sufficiency of the cause shown for the delay in filing. In my opinion, if the cause shown is *prima facie* sufficient the section requires the judge to designate another judge. Prejudice being shown, it was not competent for the judge to pass on any disputed question of fact involved in the showing. As said by the Supreme Court in the *Berger* case:

> "At any rate, we can only deal with it as it is expressed, and enforce it according to its expressions. Nor is it our function to approve or

> disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial,—free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. *And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged.*"

In this case none of the averments made in the showing were denied by the counter-affidavit filed on behalf of the plaintiff, so no question arises as to the power of the judge to pass on controverted question of fact with relation to the showing. But the section must also be construed, when a *prima facie* showing is made, as precluding the judge from denying the application to designate another judge.

Let us assume that the showing made is such that different judges might arrive at different conclusions as to its sufficiency. If the showing is of this character then it must be held that it is sufficient and that the judge is obliged to designate another judge. If the section were otherwise construed and any discretion were vested in the judge, the very evil which the statute was intended to remedy would still exist. In such a case the judge who was biased and prejudiced might be thereby influenced in passing on the sufficiency of the showing made.

At page 57 of my brief I referred to the fact that in the opinion, filed at the time the judge denied the motions to designate another judge, certain

statements are made which are wholly outside of the record. In this brief counsel make no reference to this matter but quote in full the opinion of the judge. In view of the fact that his opinion is quoted at length by counsel, I shall briefly refer to the particulars wherein the statements of fact are not supported by the record.

The judge states in his opinion that in 1919 during the trial of the case of *Lineker v. Dillon* he

> "first gave voice to expressions substantially similar to those complained of here—both of the McColgans being in court at the time."

The judge in his opinion also made the following statement:

> "Here the substantive evidence of the claimed bias and prejudice had been presented to the complaining defendants as early as the trial of *Lineker v. Dillon* in 1919."

The judge made these statements in support of his conclusion that the affidavits should have been filed within ten days before the beginning of the term. The statements above quoted are wholly unsupported by the record.

Moreover, as pointed out at page 59 of my brief, it is impossible that the facts showing bias and prejudice alleged in the affidavits could have existed in 1919. Even if Judge Van Fleet had harshly criticized these defendants in 1919, such criticism could not, in the nature of things, have been coupled with the statements quoted in these affidavits show-

ing that the prejudice of the judge was so strong that the judgments rendered in favor of the defendants in the state courts "did not change his attitude at all" and that he hoped to be able to see his way clear to overrule the pleas of *res judicata.*

In his opinion the judge also states that he

> "was not aware of any sentiment or feeling that would preclude him from giving a fair and impartial trial to the issues involved in this cause as to all of the defendants."

Even if the judge had filed an affidavit to that effect (and he did not), such affidavit would be wholly immaterial under the decision of the Supreme Court in the *Berger* case.

Counsel say that Judge Van Fleet merely indicated the impression made upon his mind as a judge by certain evidence given in the *Dillon* case, and that any opinion formed or conclusion reached were formed and reached in the exercise of his judicial functions.

In reply I will say that if a judge harshly criticizes a witness in a cause, charging him with dishonesty and fraud, and this witness subsequently is a party to an action before such judge, that he can file an affidavit showing bias and prejudice and that the affidavit will be sufficient.

In the *Berger* case the judge, Landis, made statements which showed prejudice against the class of which the defendants impleaded with Berger were members. These statements, equally with the state-

ments here in question, may be said to have been made "in the exercise of the judicial functions" of the judge. In the case where Judge Landis made the statements he had formed the opinion that German-Americans were disloyal and so expressed himself. In the case at bar Judge Van Fleet in the *Dillon* case formed the opinion that the McColgans had acted dishonestly and fraudulently. The *Berger* case is in principle the same as the case at bar, the only difference being that in the *Berger* case the statements made by the judge merely indicated prejudice against a class, whereas in the case at bar the statements show prejudice against these very defendants.

Judge Van Fleet in his opinion says that

> "personal prejudice and bias cannot be said to arise from views formed in the mind of the judge founded upon sworn testimony in a cause, and if it were otherwise no judge would be qualified to re-try a cause where for any reason the judgment first entered had to be set aside and the cause re-heard."

As I have pointed out in the brief, there is a well recognized distinction between statements made by a judge after hearing the evidence and statements made before he has heard the evidence. If at the conclusion of a trial and after a verdict of guilty the judge should say that he believes the defendant guilty, that statement would not show prejudice; but if the judge should make such a statement before the trial commenced it would show prejudice. Judge Van Fleet in his opinion fails to differentiate

between a case where the statement is made after hearing the evidence and when it is made in advance of hearing the evidence.

If when a judge starts to try a case there is no inclination toward either side but after having heard the evidence there is an inclination toward one side or the other, such inclination is not "prejudice"—the very meaning of the word itself shows that it is not. But if that inclination exists before the judge has heard the case then the judge is prejudiced.

Counsel say that the statements of Judge Van Fleet "constitute an expression of *judicial* opinion as contradistinguished from a *personal* opinion." The statute says that if the judge "has a personal bias or prejudice either against the defendant or in favor of, any opposite part to the suit" he is disqualified. *It is the attitude of mind of the judge to which the statute refers.* If that attitude is not impartial the judge is disqualified and it matters not whether the attitude is the result of what the judge has heard in a case to which the affiant was not a party or is the result of some contact with the affiant which the judge may have had wholly outside of his office of judge. The statute makes no such distinction and when the affiant avers that he believes the judge is biased or prejudiced and bases his affidavit on "fairly adequate facts and circumstances" another judge should be designated.

Obviously the prejudice and bias shown by the affidavits is personal against these defendants and in favor of the plaintiff Norvena Lineker.

The judge has stated in effect that the defendants are dishonest and that they defrauded the plaintiff Norvena Lineker. The judge also stated that the plaintiff's rights have been butchered.

It is immaterial how the judge acquired the information which has caused this prejudice and bias to exist. Of course if this case had been tried by the judge and he had so expressed himself after hearing the evidence, that fact would not entitle these defendants to have another judge called if a new trial were granted. But that is not this case.

The Supreme Court in the *Berger* case said the reasons and facts stated in the affidavit

> "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

It would be putting it too mildly to say that the affidavits here filed show a "bent of mind that may prevent or impede impartiality of judgment." The reasons and facts on which the charge of bias and prejudice is made in this case show that impartiality of judgment on the part of Judge Van Fleet is impossible.

No. 3965

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE and ICE COMPANY,

Plaintiffs in Error,

vs.

H. A. BAKER,

Defendant in Error.

VOLUME I.
(Pages 1 to 256, Inclusive.)

Upon Writ of Error to the United States District Court of the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3965

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

J. F. BOOTHE, 1124 Board of Trade Building, Portland, Oregon,
For the Plaintiffs in Error.

CAREY & KERR and OMAR C. SPENCER, Yeon Building, Portland, Oregon,
For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To H. A. Baker and to Carey & Kerr and Omar C. Spencer, His Attorneys, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 16th day of Nov., in the year of our Lord one thousand nine hundred and twenty-two.

R. S. BEAN,
Judge.

Service admitted Nov. 16, 1922.

OMAR C. SPENCER,
Attorneys for Plaintiff. [1*]

[Endorsed]: No. L.—8858. 3152. United States District Court, District of Oregon. H. A. Baker vs. William Reid et al. Citation on Writ of Error. Filed U. S. District Court, District of Oregon. Filed Nov. 17, 1922. G. H. Marsh, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Plaintiffs in Error,

vs.

H. A. BAKER,

Defendant in Error.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable ROBERT S. BEAN, one of you, between H. A. Baker, plaintiff and defendant in error, and William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, are defendants and plaintiffs in error, and a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, Califorina, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that

error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 17th day of November, 1922.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Chief Deputy. [2]

Service of the above writ of error made this 17th day of November, 1922, upon the District Court of the United States for the District of Oregon, by filing with me as said Clerk of the Court a duly certified copy of said writ of error.

G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Chief Deputy.

[Endorsed]: No. L–8858. In the U. S. Circuit Court of Appeals for the Ninth Circuit, William Reid et al., Plaintiffs in Error, vs. H. A. Baker, Defendant in Error. Writ of Error. Filed November 17th, 1922. G. H. Marsh, Clerk United States District Court District of Oregon. By F. L. Buck, Chief Deputy Clerk.

In the District Court of the United States for the District of Oregon.

November Term, 1921.

BE IT REMEMBERED, That on the 23d day of November, 1921, there was duly filed in the District Court of the United States for the District of Oregon an amended complaint, in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

No. ——.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY.

Defendants.

Amended Complaint.

Comes now the plaintiff and for cause of action against the defendants alleges as follows:

I.

During all the times herein mentioned the plaintiff was and now is a citizen and resident of the State of California.

II.

That during all of the times herein mentioned,

the defendants were and now are engaged as a copartnership under the firm name and style of National Cold Storage & Ice Company, and each of the defendants was and now is a citizen and resident of the State of Oregon.

III.

That this action involves an amount in excess of three thousand dollars ($3,000.00) exclusive of costs and interest, as will more fully appear from this amended complaint.

IV.

That during the months of July and August, 1920, the plaintiff was the owner of 398 barrels, amounting to 170,156 pounds, of loganberries, and during said months said loganberries were delivered to and stored with the defendants at their cold-storage plant in the City of Portland, Oregon. That at the time said [4] loganberries were delivered the defendants accepted the same for storage and undertook and agreed to safely store and keep said loganberries in a proper state of refrigeration so that the same would not ferment or deteriorate in value, and would be liable for any loss or damage to said property except against the act of God, fire, rats, or other animals, insects, or the elements, and the plaintiff agreed to pay to the defendants for such storage certain agreed rates, but notwithstanding such undertaking and agreement by the defendants they wholly failed and neglected to keep said loganberries in a proper or in any state of refrigeration in this: That the temperature of the room or rooms where said loganberries were

stored was permitted by defendants to go above freezing point and was permitted to reach such a point that the said loganberries were caused to ferment, as a result of which they became worthless and their market value was thereby destroyed and said loganberries ever since and now are worthless and have no market value.

V.

That said loganberries when delivered to the defendants were in a proper condition, and the plaintiff has at all times paid all charges which have been demanded by the defendants, and has at all times performed all acts and things on his part to be done.

VI.

That the said frozen loganberries delivered to the defendants and stored by them in the months of July and August, 1920, were to be removed by plaintiff during the fall of 1920, during all of which time the market value of said loganberries had they been kept in such condition as to refrigeration as they were in when delivered to the defendants, was seventeen and one-half [5] cents per pound; but on account of the failure of the defendants to safely keep said loganberries in a proper state of refrigeration, and on account of the neglect of the defendants in failing to maintain said cold-storage plant or the room or rooms where said loganberries were stored in such condition that the temperature would not go above freezing point, the said loganberries after their receipt by defendants and during the fall of 1920,

were and now are worthless. That said loganberries were not removed by plaintiff in the fall of 1920, because their market value was destroyed by the defendants in the manner herein indicated.

VII.

That by reason of the premises the plaintiff has been damaged to the extent of the market value of said loganberries, or at the rate of seventeen and one-half cents per pound, or a total sum of twenty-nine thousand, seven hundred seventy-seven dollars and thirty cents ($29,777.30.)

WHEREFORE, plaintiff prays judgment against the defendants for twenty-nine thousand seven hundred seventy-seven dollars and thirty cents ($29,777.30), together with his costs and disbursements herein.

CAREY & KERR,
OMAR C. SPENCER,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, Omar C. Spencer, being first duly sworn depose and say that I am one of the attorneys for the plaintiff in the within action; that I have read the foregoing amended complaint, and the facts therein contained are true as I verily believe; that I [6] make this verification for the reason that the plaintiff is not now within the State of Oregon.

OMAR C. SPENCER.

Subscribed and sworn to before me this 23d day of November, 1921.

G. C. FRISBIE,
Notary Public for Oregon.

State of Oregon,
County of Multnomah,—ss.

Due service of the within amended complaint is hereby accepted in Multnomah County, Oregon, this 23d day of November, 1921, by receiving a copy thereof, duly certified to as such by Omar C. Spencer, of attorneys for plaintiff.

J. F. BOOTHE,
Attorney for Defendants.

Filed Nov. 23, 1921. G. H. Marsh, Clerk. [7]

AND AFTERWARDS, to wit, on the 29th day of November, 1921, there was duly filed in said court answer to amended complaint, in words and figures as follows, to wit: [8]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Answer to Amended Complaint.

The defendants answer the amended complaint of the plaintiff herein as follows:

I.

They admit Paragraphs I, II and III of the complaint.

II.

They deny each and every allegation contained in Paragraphs V, VI and VII of the complaint.

III.

Answering Paragraph IV of the complaint, the defendants say that during the months of July and August, 1920, the plaintiff delivered and stored with the defendants in their cold-storage plant, in the City of Portland, Oregon, 398 barrels of loganberries, amounting to approximately 170,156 pounds, which goods the defendants agreed to keep in refrigeration, at a price agreed upon to be paid by the plaintiff for said storage, and to use ordinary care such as prudent persons in the cold-storage business were accustomed to exercise toward such property, and to deliver the same to the plaintiff whenever requested so to do, subject to the act of God, fire, rats or other animals, insects or the elements. Save and except as herein stated, defendants deny each and every allegation contained in Paragraph IV of plaintiff's [9] amended complaint.

Further answering the amended complaint, the defendants allege:

I.

That the loganberries mentioned in the complaint were perishable goods and contained the natural inherent elements which would produce deterioration.

II.

That the 398 barrels of loganberries mentioned in the complaint were hauled a long distance in autotrucks during warm weather and were all warm and in bad condition when delivered to the defendants. That more than half were fermenting and sizzling and many barrels were bursting and blowing up.

III.

That upon receipt of said goods, the defendants placed them in their cold-storage plant and froze them and checked fermentation of those in bad condition, and thereafter kept them in refrigeration sufficient to preserve goods of that character if in good condition, except the natural decay inherent in the goods.

IV.

That the only time the plaintiff designated a temperature he desired was on or about the 13th day of August, when he requested a temperature of 24 degrees. That thereafter, the defendants maintained a temperature of 24 degrees in the room where said goods were stored.

V.

That said loganberries have ever since been and now are in as good condition as they were when placed in the cold-storage plant of the defendants,

except the natural decay or deterioration inherent in the goods themselves. [10]

VI.

That if said loganberries are in a damaged condition, such damages were caused by the negligence of the plaintiff in permitting them to ferment and become damaged prior to the time they were placed in the cold-storage plant of the defendants.

For a further and separate answer and by way of counterclaim against the plaintiff, the defendants allege:

I.

That during the years 1920 and 1921, the plaintiff stored with the defendants in their cold-storage plant in the City of Portland, Oregon, various and sundry barrels of loganberries, including the 398 barrels mentioned in the complaint herein, for which storage the plaintiff promised to pay the defendants at the rate of $1.15 per barrel for the first month, and sixty-five cents per barrel per month thereafter.

II.

That an open and mutual account, therefore, existed between the defendants and the plaintiff. That the defendants rendered to the plaintiff an itemized statement of the storage accrued at the end of each and every month up to September 30, 1921, at which last date an account rendered to the plaintiff for said storage amounted to the sum of $5,811.34, no part of which has been paid, and there is now due and owing from the plaintiff to the defendants the sum of $5,811.34, with interest thereon from September 30, 1921.

III.

That said storage was payable monthly, and at the end of each and every month a demand therefor was made of the plaintiff; that the plaintiff received each and every statement above-mentioned and demand of payment; that the plaintiff has never made any objection to any of the said accounts so rendered. That [11] said sum of $5,811.34 has become a stated account due from the plaintiff to the defendants.

WHEREFORE, defendants pray for judgment that the plaintiff take nothing by his complaint, but that the defendants recover from the plaintiff the sum of $5,811.34, together with interest thereon from and after September 30, 1921, and for their costs and disbursements of this action.

J. F. BOOTHE,
Attorney for Defendants.

State of Oregon,
County of Multnomah,—ss.

I, Wilbur P. Reid, being first duly sworn, depose and say that I am one of the defendants in the above-entitled action; and that the foregoing answer is true as I verily believe.

[Seal] WILBUR P. REID.

Subscribed and sworn to before me this 29th day of November, 1921.

J. F. BOOTHE,
Notary Public for the State of Oregon.

My commission expires Oct. 1, 1924.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 29th day of November, 1921, by receiving a copy thereof, duly certified to as such by J. F. Boothe, attorney for defendants.

OMAR C. SPENCER,
Of Attorneys for Plaintiff.

Filed Nov. 29, 1921. G. H. Marsh, Clerk. [12]

AND AFTERWARDS, to wit, on the 7th day of December, 1921, there was duly filed in said court, a reply in words and figures as follows, to wit: [13]

In the District Court of the United States for the District of Oregon.

No. ——.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE AND ICE COMPANY,

Defendants.

Reply.

Comes now the plaintiff and for reply to the affirmative matter contained in the first further and separate answer and defense, admits, denies and alleges as follows:

I.

Plaintiff admits that the loganberries mentioned in the complaint were perishable provided they were not kept in a proper state of refrigeration by the defendants, and except as above admitted he denies each and every allegation contained in paragraph I of said answer.

II.

Plaintiff admits that the said loganberries were delivered to the cold-storage plant of the defendants by autotruck during the summer of 1920, but except as above admitted, plaintiff denies each and every allegation contained in paragraph II of said answer.

III.

Plaintiff admits that upon the receipt of said loganberries defendants placed them in their cold-storage plant, but except as above admitted, he denies each and every other allegation contained in paragraph III of said answer.

IV.

Plaintiff denies each and every allegation of [14] paragraphs IV, V and VI of said answer.

Further replying to the second further and separate answer set up by way of counterclaim, plaintiff admits, denies and alleges as follows:

I.

Plaintiff admits that during the year 1920, certain barrels of loganberries were stored with the defendants at their cold-storage plant, and in consideration of the defendants' agreement to keep said loganberries in a proper state of refrigeration, plaintiff agreed to pay certain storage charges, but except as above admitted, plaintiff denies each and every allegation contained in paragraph I of said second further and separate answer.

II.

Plaintiff admits that he has not paid any part of the sum of $5,811.34 to the defendants, but except as above admitted, he denies each and every allegation contained in paragraph II of said second further and separate answer.

III.

Plaintiff denies each and every allegation contained in paragraph III of said second further and separate answer.

WHEREFORE, plaintiff prays for judgment as in his complaint demanded.

CAREY & KERR,
OMAR C. SPENCER,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, Omar C. Spencer, being first duly sworn depose [15] and say that I am one of the attorneys for the within named plaintiff; that I have read the foregoing reply, and the same is true, as I verily believe; that I make this verification for the reason

that the plaintiff is not now within the county of Multnomah, State of Oregon.

OMAR C. SPENCER.

Subscribed and sworn to before me, this 7th day of December, 1921.

[Seal] G. C. FRISBIE,
Notary Public for Oregon.

State of Oregon,
County of Multnomah,—ss.

Due service of the within reply is hereby accepted in Multnomah County, Oregon, this —— day of December, 1921, by receiving a copy thereof, duly certified to as such by Omar C. Spencer, of attorneys for plaintiff.

J. F. BOOTHE,
Attorney for Defendant.

Filed Dec. 7, 1921. G. H. Marsh, Clerk. [16]

AND AFTERWARDS, to wit, on the 15th day of June, 1922, there was duly filed in said court a verdict, in words and figures as follows, to wit: [17]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Verdict.

We, the jury duly impaneled in the foregoing cause to try the same, find a verdict in favor of plaintiff and against the defendants and assess the damage of plaintiff in the sum of twenty-three thousand dollars ($23,000.00), with storage charges paid.

FRANK E. HILTON,
Foreman.

Filed June 15, 1922. G. H. Marsh, Clerk. [18]

AND AFTERWARDS, to wit, on Thursday, the 15th day of June, 1922, the same being the 87th judicial day of the regular March term, of said Court — Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [19]

In the District Court of the United States for the District of Oregon.

No. L—8858.

June 15, 1922.

H. A. BAKER

vs.

WILLIAM REID et al.

Minutes of Court—June 15, 1922—Judgment.

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. Whereupon on motion of defendants for a directed verdict in their favor herein,—

IT IS ORDERED that said motion be and the same is hereby denied, and that said defendants be and they are hereby allowed an exception to said ruling.

And said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retire in charge of proper sworn officers to consider of their verdict. And thereafter said jury returns to the Court the following verdict, viz.:

> "We, the Jury duly impaneled in the foregoing cause to try the same, find a verdict in favor of plaintiff and against the defendants and assess the damage of plaintiff in the sum of Twenty-three Thousand Dollars ($23,000.00) with storage charges paid.
>
> FRANK E. HILTON,
> Foreman."

—which verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that said plaintiff do have and recover of and from said defendants the sum of $23,000.00, and its costs and disbursements herein taxed in the sum of $319.66 and that said plaintiff have execution therefor. [20]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was duly filed in said Court, a petition for writ of error, in words and figures as follows, to wit: [21]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Petition for Writ of Error.

William Reid and Wilbur P. Reid, the defendants in the above-entitled action, conceiving themselves aggrieved by the final order and judgment of this Court made and entered against them and in favor of the plaintiff on the 15th day of June, 1922, and the verdict and judgment of the jury in said cause made and the objections severally taken thereto and the rulings of the Court thereon, as set forth in their assignments of error filed herein, petition said Court for an order allowing said defendants to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignments of error filed herewith under and in accordance with

the rules of the United States Circuit Court of Appeals in the behalf made and provided.

And also that an order be made fixing the amount of security which the defendants shall give and furnish in said writ of error, and that upon giving such security all other proceedings in the Court be suspended and stayed until the dismissal of said writ of error by the United States Circuit Court of Appeals, and relative thereto the defendants respectfully show:

That by reason of the premises the defendants allege [22] manifest error has happened, to the great damage of the defendants herein.

The defendants have filed herewith their assignments of error upon which they rely and will urge in the said United States Circuit Court of Appeals.

WHEREFORE, the defendants pray that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this Court for the correction of the errors so complained of, and that a transcript of the record of proceedings, papers and all things concerning the same, upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that the defendants recover judgment as demanded in their answer.

J. F. BOOTHE,
Attorney for the Defendants.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition is hereby accepted in Multnomah County, Oregon, this 8th day of November, 1922, by receiving a copy thereof, duly certified to as such by J. F. Boothe, attorney for defendants.

OMAR C. SPENCER,
Attorney for Plaintiff.

Filed Nov. 16, 1922. G. H. Marsh, Clerk. [23]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [24]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Assignments of Error.

Come now the above-named defendants appear-

ing by J. F. Boothe, their attorney of record, and say that the judgment and final order of this Court made and entered in the above-entitled court on the 15th day of June, 1922, in favor of the plaintiff above named and against the defendants above named is erroneous and against the just rights of the defendants, and file herein, together with their petition for writ of error from said judgment and order, the following assignments of error, which they aver occurred upon the trial of said cause:

(1) The Court erred in admitting evidence over the objections and exceptions of the defendants to the shipping of two or more carloads of loganberries from the defendants' cold-storage plant in Portland, Oregon, to Chicago, Illinois, on and after the 4th of August, 1920, and to the testimony brought out before the jury concerning the condition of the loganberries so shipped on their arrival in Chicago.

(2) The Court erred in refusing, over the exception of the defendants, to direct the jury to bring in a verdict in favor of the defendants.

(3) The Court erred in overruling defendants' objections [25] generally to a judgment in favor of the plaintiff for any sum of money and in not entering judgment as requested in their favor for the reason that the testimony properly supports a judgment in favor of the defendants.

(4) The Court erred in failing to enter a judgment for the defendants as requested and in not

giving judgment in favor of the defendants for the dismissal of the plaintiff's complaint.

WHEREFORE, the said defendants and plaintiffs in error pray that said judgment of the District Court be reversed, with directions to the District Court to enter judgment in favor of the defendants.

J. F. BOOTHE,
Attorney for Defendants.

State of Oregon,
County of Multnomah,—ss.

Due service of the within assignments of error is hereby accepted in Multnomah County, Oregon, this 8th day of November, 1922, by receiving a copy thereof, duly certified to as such by J. F. Boothe, attorney for defendants.

OMAR C. SPENCER,
Of Attorneys for Plaintiff.

Filed Nov. 16, 1922. G. H. Marsh, Clerk. [26]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was duly filed in said court, a supersedeas bond, in words and figures as follows, to wit: [27]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS, that William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, as principal, and Etta Reid and Alfred J. Bingham, as sureties, are held and firmly bound unto H. A. Baker, in the sum of Twenty-five Thousand Dollars ($25,000.00), to be paid to said H. A. Baker, for the payment of which well and truly to be made, we bind ourselves, our successors, executors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of November, 1922.

Whereas, the above-named William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, have applied for and obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to re-

verse the judgment rendered in the above-entitled cause by the District Court of the United States, for the District of Oregon.

NOW, THEREFORE, the condition of this obligation is such that if the said William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, shall prosecute said writ to effect and answer all damages and costs, if they shall fail to make good their plea, [28] then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

WILLIAM REID.
WILBUR P. REID.
ETTA REID.
ALFRED J. BINGHAM.

State of Oregon,
County of Multnomah,—ss.

We, Etta Reid and Alfred J. Bingham, whose names are subscribed to the within undertaking as sureties, being severally duly sworn, each for himself says: That I am a resident and freeholder within the State of Oregon and am not a counselor or attorney at law, sheriff, clerk or other offcer of any court, and am worth the sum of Fifty Thousand Dollars ($50,000) over and above all debts and liabilities and exclusive of property exempt from execution.

ETTA REID.
ALFRED J. BINGHAM.

Subscribed and sworn to before me this 15th day of November, 1922.

[Seal] J. F. BOOTHE,
Notary Public for Oregon.

My commission expires Oct. 1, 1924.

Filed Nov. 16, 1922. G. H. Marsh, Clerk.

Approved Nov. 16, 1922.

R. S. BEAN,
Judge. [29]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was filed in said court a praecipe for transcript, in words and figures as follows, to wit: [30]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled cause, to be filed in the office of the Clerk of the United States Cir-

cuit Court of Appeals, for the Ninth Circuit, under the writ of error to be perfected herein, and include in said transcript the following proceedings, papers, records and files, to wit:

(1) Plaintiff's amended complaint; (2) defendants' answer; (3) plaintiff's reply; (4) judgment; (5) bill of exceptions; (6) exhibits, and testimony; (7) petition for writ of error; (8) assignments of error; (9) order allowing writ of error and fixing bond; (10) writ of error; (11) citation, on writ of error, and all other records, entries, orders, papers and files necessary and proper to make a complete record from said writ of error in said cause; said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals, for the Ninth Circuit.

J. F. BOOTHE,
Attorney for the Defendant.

Filed Nov. 16, 1922. G. H. Marsh, Clerk. [31]

AND AFTERWARDS, to wit, on the 17th day of November, 1922, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [32]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on the 12th day of June, 1922, at Portland, Oregon, the above-entitled action came on for trial before the Honorable Robert S. Bean, District Judge, and a jury, the plaintiff appearing by Carey & Kerr and Omar C. Spencer as his attorneys, and the defendants appearing by J. F. Boothe as their attorney, whereupon the following proceedings were had:

It appears from the evidence that during the months of July and August, 1920, the plaintiff deposited with the defendants in their cold-storage plant at Portland, Oregon, about 1,720 barrels of loganberries, which the defendants, for a certain consideration, agreed to keep under refrigeration, to be delivered to the plaintiff or shipped out under his orders.

Plaintiff offered evidence tending to show that prior to August 1, 1920, two of said barrels, and after August 1, 1920, the remaining of said barrels were

shipped to various points to the plaintiff, or under the direction of the plaintiff, except the 398 barrels which were still on hand in said cold-storage plant at the time this action was commenced. Plaintiff also offered evidence tending to show that from and after August 1, 1920, the temperature of the room where said berries were stored was permitted by said defendants to go above freezing, resulting in fermentation and that the market value of said 398 barrels had been destroyed.

At the trial of this cause, the plaintiff introduced [33] as evidence by deposition, the testimony of Matthew H. Theis and Peter J. Slaughter of Chicago, and the plaintiff was a witness in his own behalf, all of which witnesses testified concerning the condition of the loganberries in Chicago, Illinois, which were so shipped from said cold-storage plant by the plaintiff to customers of the plaintiff at Chicago, Illinois.

In support of the plaintiff's case and in order to show the damaged condition of the 398 barrels of loganberries, the subject of this action, the plaintiff, H. A. Baker, was called as a witness and was asked the following question: "Now, what did you do toward attempting to save the product after this fermentation had been evident in it? What I mean is, did you sell it or undertake to sell it?" To which the witness answered: "Why, we had them in transit five or six cars, I think four or five cars—five cars, we will say, that had been shipped out between the first of August, and when the difficulty arose, we will say the sixteenth of August. One of the cars that were shipped into Chicago—"

At this point of the testimony the defendants, by their attorney, stated: "Your Honor, I object to that, to this answer, and move to have it stricken out. That has nothing to do with these barrels that are in question. What he had shipped to Chicago had nothing to do with this, these particular goods we are dealing with, these 398 barrels that he says were in cold storage at that time."

Counsel for the plaintiff then stated: The fact of the matter is, your Honor, it is our position in this case that the same treatment was given to all of the barrels as to those that were shipped out prior to about the first of August. I think there were about two cars which went out prior to the first of August. It was after the first of August that the temperature went up to thirty-six degrees and stayed there some time, and it is our notion [34] about it that the same thing happened, substantially, to all of those barrels of berries that were subject to that rise in temperature. My idea about it is that berries that were subject to that that went East and arrived in bad order are in just the same shape as these are here now in bad order."

The COURT.—"You are not claiming—"

Mr. SPENCER.—"We are not claiming any damages for those that went East."

The COURT.—"They were in there at the same time. He may answer."

Mr. SPENCER.—"We are not claiming any damages to those that went East at all, because they were sold to other people."

Mr. BOOTHE.—"Note an exception."

The witness then answered: "The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about between fifty and sixty per cent; I understand there was about one hundred barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty to sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad condition, and all that were shipped arrived after that—between that time and when I stopped them, when I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation.

Question. "You shipped, as I understand your earlier statement, two cars prior to August first?" [35]

Answer. "Two cars were shipped to St. Louis, containing one hundred and five barrels each, which arrived in good condition."

Question. "No claim was made against you or anybody else as to that?"

Answer. "No, sir."

Question. "But as to the barrels that were in there on August first and were shipped out after

that date, or were put in after that date and subsequently shipped out, what is the fact as to whether or not claims have been made against you on account of the fermented condition—bad condition?"

Mr. BOOTHE.—"I object to that, your Honor. Those goods were shipped a long ways in refrigerator-cars, probably three or four weeks reaching their destination."

The COURT.—"I think it is a circumstance; whatever the jury thinks it is worth, of course."

Answer. "Why, most of them arrived in bad condition, excepting these I have just mentioned, the two cars."

To all of which testimony the defendants by their attorney objected, and excepted to the rulings of the Court in permitting the same to be given, and an exception was allowed.

At the conclusion of the testimony the defendants, by their attorney, requested the Court to instruct the jury to bring in a verdict in favor of the defendants for the following reasons: The testimony in this cause shows that many of the barrels of loganberries were in a fermenting and damaged condition at the time they were placed in the cold-storage plant of the defendants. That the burden of proof is always on the plaintiff to show negligence on the part of the defendants which caused damage to the goods, if any. That the defendants, having overcome by their evidence any presumption of negligence on their part and having produced testimony [36] to the effect that the said 398 barrels of loganberries were in a damaged condition

when placed in the cold-storage plant of the defendants, it became necessary for the plaintiff to then go forward with the evidence and still maintain the burden of proof in order to charge the defendants with negligence. That if the said loganberries were delivered to the defendants in a damaged condition and were still further damaged by the acts of the defendants it was the duty of the plaintiff to show the value of the goods when placed in cold-storage and the value of the goods after they were further damaged by the acts of the defendants. That no such proof having been offered by the plaintiff, the defendants were entitled to a directed verdict in their favor, which the Court refused. To the refusal of the Court in so directing the jury, the defendants by their counsel duly excepted and an exception was allowed.

And now, because the foregoing matters and things are not of record in this cause, I, Robert S. Bean, Judge of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing bill of exceptions truly states proceedings had before me and the jury on the trial of the above-entitled action, and contains, together with the evidence herewith certified by the Clerk of the Court, all the evidence, both oral and written, introduced by either of said parties throughout said trial, together with the rulings of the Court on the questions of law presented and that exceptions taken by the defendants therein were duly prepared and submitted within the time allowed by the rules of this Court as extended by

stipulation of the parties and the order of this Court duly made and entered in accordance with the provisions of such stipulations, and is now signed and settled as and for the bill of [37] exceptions in the above-entitled action, and the same is ordered and made a part of the record in said action. All the testimony and exhibits in this cause shall be deemed a part of this bill of exceptions.

Dated Nov. 16, 1922.

R. S. BEAN,
Judge.

O. K.—OMAR C. SPENCER.

State of Oregon,
County of Multnomah,—ss.

Due service of the within bill of exceptions is hereby accepted in Multnomah County, Oregon, this 8th day of November, 1922, by receiving a copy thereof, duly certified to as such by J. F. Boothe, attorney for defendants.

OMAR C. SPENCER,
Of Attorneys for Plaintiff.

Filed Nov. 17, 1922. G. H. Marsh, Clerk. [38]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

BE IT REMEMBERED, That this cause came on to be heard before the Honorable Robert S. Bean, Judge of the above-entitled court, and a jury duly empaneled to try same, on Monday, June 12, 1922, at the hour of 2:00 o'clock P. M. of said day; the plaintiff appearing by Mr. Omar C. Spencer, his attorney, and the defendants appearing by Mr. J. F. Boothe, their attorney.

WHEREUPON, the jury having been duly accepted and the opening statements made by counsel for the respective parties, the following proceedings were had:

Testimony of L. H. Huntley, for Plaintiff.

L. H. HUNTLEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. SPENCER.—I will say, your Honor, I am calling this witness a little out of order; he wants to get away and he is the man who made an examination of the contents of this barrel.

Q. Your name is L. H. Huntley?

A. Yes, sir.

Q. What is your profession? A. Chemist.

Q. A chemist? A. Yes, sir.

Q. What experience have you had as a chemist?

A. About thirteen years. [39]

Q. Are you a graduate of any school of chemistry?

A. Northwestern University, yes, sir.

(Testimony of L. H. Huntley.)

Q. And you have been engaged as chemist for about fifteen years? A. Yes, sir.

Q. Whereabouts?

A. Back east and Chicago and in Portland.

Q. How long have you been located in Portland?

A. Oh, since 1909, with the exception of three years when I was back east.

Q. Do you maintain laboratories here?

A. I do.

Q. Under what name?

A. It is the Howe and Huntley laboratories, at 606 Medical Building.

Q. How long have you maintained those laboratories? A. Three years.

Q. What is the character of your work as a chemist? A. General chemistry.

Q. Do you have occasion to be employed by the City and State at times?

A. Occasionally, yes, sir.

Q. Mr. Huntley, did you have occasion to go with one Mr. Baker to the cold-storage plant of the Reids, the National Cold-Storage and Ice Company, to examine or take samples from barrels of loganberries? A. I did.

Q. When was that?

A. That was in October, 1921.

Q. And you went there at the request of Mr. Baker, the plaintiff in this case? A. I did.

Q. And what did you do when you got there?

A. Took samples from several barrels of berries.

(Testimony of L. H. Huntley.)

Q. Just describe, will you please, how you took those samples, from what barrels or how many? [40]

A. We took samples from several barrels. Some barrels we broke open and took specimens and some we took specimens from that were already broken open.

Q. In taking off samples, what was your object, as to the barrels?

A. To get a fair and general sample of the whole lot.

Q. Then what did you do with those samples you took? A. I examined them.

Q. You took them back with you to your laboratory? A. Yes, sir.

Q. Did you make a test of the contents of these barrels of loganberries? A. I did.

Q. You say Mr. Baker was with you at the time?

A. Yes, sir.

Q. And were those pointed out as the barrels of loganberries that he had originally placed there with the cold-storage people? A. They were.

Q. Now, will you just please explain what you found from your chemical analysis of the contents of those barrels?

A. Upon examination of the berries I found that there had been fermentation and that you cannot have fermentation unless you have a production of alcohol and carbonic acid gas, and during the process of the fermentation the carbonic acid gas swells up and usually blows the container, the same

(Testimony of L. H. Huntley.)

as it does in home brew. In a good many cases you put the cork in and fermentation goes on, it either breaks the bottle or blows the cork. Same with these berries, something breaks and usually it is the barrel.

Q. In all the samples you took there, will you say whether or not you did find alcohol and carbonic acid gas in all of them?

A. I found alcohol, and if you have alcohol you must have carbonic [41] acid gas, naturally.

Q. Did you find any acetic acid?

A. I did, above the normal.

Q. Can you explain to the jury just how you made these tests, so they will get some more—

A. I usually make those tests in comparison; that is, I took these particular berries and loganberry juice, fresh juice which I bought on the market, and then I purchased some of the dried loganberries, as it was not possible at that time to get the fresh berries. These three ingredients, or these three berries, I subjected to the same process. The fresh berry juice which I got showed complete fermentation, that is to say, the juice completely fermented. The berry juice which I extracted from the dried berries showed the same condition. The juice which I took from the berries in the warehouse showed only a very partial fermentation, showing that fermentation had actually been in process and was practically complete at the time I took the sample.

Q. In discussing fermentation, is there such a

(Testimony of L. H. Huntley.)

thing as partial fermentation or complete fermentation, and how do you refer to that?

A. Well, in speaking of fermentation it is understood you can only actually ferment about eighty per cent of the sugar present. The other twenty per cent is a rather nonfermentative type and about eighty per cent is all you can possibly ferment.

Q. Well, when loganberries are fermented is there any partial stage about it or is it a complete stage of fermentation?

A. Well, usually goes on to a finish, once it is started.

Q. These berries you analyzed there, had they gone on to the finish, or had they just started?

A. I think they had finished.

Q. And can you say what percentage of alcohol you found in those berries? [42]

A. Approximately three per cent.

Q. Three per cent? A. Yes, sir.

Q. Now, from your analysis and from your knowledge as a chemist, what would that indicate as to the food value, particularly with reference to the sugar present in the berries?

A. The sugar content of the berries show around from six to ten per cent, and if you find three per cent of alcohol that means you must have fermented six per cent of sugar, because your alcohol is made of sugar, half and half; half of your sugar goes to alcohol and half of your sugar goes to carbonic acid gas. To use six per cent of sugar you have three

(Testimony of L. H. Huntley.)

per cent of alcohol and if you ferment six per cent of sugar out of your berries there is not going to be very much left.

Q. From your examination of these berries and from what you found in them, would you say their value as food had been destroyed, or not?

A. I would.

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

You said it was October 21st when you went there for some of these berries?

A. I said in October; I think it was the 29th.

Q. Twenty-ninth? A. Yes, sir.

Q. Who went with you? A. Mr. Baker.

Q. Who did you see over there at the plant, if anybody, that let you in to look at the berries? [43]

A. That was through the auspices of Mr. Baker; I don't remember the gentleman who introduced us.

Q. Some attendant there take you down?

A. With Mr. Baker; yes, sir.

Q. What kind of looking man was he?

A. That is quite a while ago; I could not tell you.

Q. This man here?

A. I don't know, I am sure.

Q. How many barrels did you examine?

A. Probably eight or ten.

Q. Where were they located; what part of the plant? A. In the basement.

Q. In what part of the basement?

(Testimony of L. H. Huntley.)

A. Well, sir, I could not tell you in what part of the basement. I know we went down an elevator into the basement and there the barrels were piled, I should judge in the northeast corner of the basement, if my sense of direction is correct.

Q. How did you get into the barrels?

A. We broke them open.

Q. Were any of the heads burst that you opened up? A. I beg your pardon?

Q. Were any of the heads burst that you opened up?

A. Well, some of them we didn't have to open up, some of them were already bursted wide open.

Q. You examined those that were already open, too, did you? A. Yes, sir.

Q. How many did you examine that you opened?

A. That we broke open?

Q. That you broke open.

A. As I say, we took specimens from probably eight or ten barrels, making an average of the eight or ten; that is, we took a portion of each one of eight or ten barrels, some that were opened, some not opened. [44]

Q. From your examination of those barrels you found there, did you say that those whole 398 barrels of loganberries were ruined?

A. I would say so; yes, sir.

Q. You don't know anything about any of them except those few you opened?

A. I should judge that would be sufficient, just the same as examining all of them.

(Testimony of L. H. Huntley.)

Q. Are you going to lump the whole 398 because you examined eight or ten barrels?

A. Because I examined the eight or ten barrels I would say they were all alike.

Q. You say that the whole of the 398 were destroyed for food?

A. As I say, I didn't analyze each individual barrel, because that would be an endless task. Whenever we do anything of that kind we take an average of the whole and make an analysis of it and as a rule that passes.

Q. Did you tell Mr. Reid or anybody in connection with the plant there you were going to examine those goods? A. I did not.

Q. Why didn't you tell Mr. Reid?

A. I was hired by Mr. Baker.

Q. So you and Mr. Baker went around in there and got into the basement and got some samples and made your examination without telling Mr. Reid anything about it?

A. That was through the auspices of Mr. Baker. Mr. Baker did the arranging; I had nothing to do with it.

Q. Do you not know as a fact that if you take those very same samples you examined and put some sugar in them they are substantially as good as they ever were?

A. No, sir; they would not be. [45]

Q. You are positive of that, are you?

A. Yes, sir.

Q. Did you ever see that done?

(Testimony of L. H. Huntley.)

A. I would not want to eat them.

Q. I was asking you if you ever saw that done?

A. No, sir, I never have.

Q. You know it is done, do you not?

A. No, sir, I do not.

Q. The fact that you found some alcohol in there did not cause you to condemn the goods, did it?

A. Cannot have alcohol unless we have fermentation.

Q. Well, it is natural to have alcohol in berries, isn't it?

A. No, sir; it is not without fermentation.

Q. Don't all kinds of berries, when they ferment, create alcohol?

A. Fresh fruit doesn't have alcohol.

Q. I know; but you take fresh fruit, fresh berries, when they ferment don't they produce alcohol?

A. Anything that is fermented produces alcohol; yes, sir.

Q. When you put the sugar back, doesn't that put them back where they were?

A. No, sir; you still have your alcohol present.

Q. It practically recuperates them, does it not?

A. I would say not; no, sir.

Q. What was the object of putting these berries in cold storage? A. I suppose to keep them.

Q. Keep them what? A. Keep them fresh.

Q. Will that keep them fresh, putting them in cold storage?

A. That is what they are put there for.

Q. Those berries have within themselves, there,

(Testimony of L. H. Huntley.)

natural inherent qualities which will destroy them, have they not? [46] A. I beg your pardon, sir.

Q. Those berries have within themselves, there, natural inherent qualities which will destroy them, have they not? A. All fruit has that.

Q. All fruit has them? A. Yes.

Q. They are all perishable? A. Yes.

Q. And merely freezing them holds them where they were; isn't that the idea?

A. That is my understanding.

Q. Then if those berries when they were put into that cold-storage plant were in a fermenting condition what would the freezing do to them?

A. I don't know as it would do anything to them.

Q. Would it help them any?

A. It might check their fermentation.

Q. Suppose, then, Mr. Huntley, if those goods when they were put in that warehouse were in a fermenting condition, some of the barrels bursting, and they were frozen, would that have a tendency to retain them in the same condition that they were put in there?

A. Well, it takes a very cold temperature to stop fermentation.

Q. How cool?

A. Well, you have to have practically ice before you prevent fermentation.

Q. How cool have you got to put them down to stop fermentation?

A. Well, as to that, I don't know how cold it has to be. It has to be frozen practically solid.

(Testimony of L. H. Huntley.)

Q. Then if they went in there in a fermenting condition it would be almost impossible to preserve them by freezing?

A. It would depend on your temperature. [47]

Q. How cool do you say they ought to be?

A. Well, around twenty-two or twenty-three, around there, you would perhaps check that fermentation.

Q. That would freeze them into ice?

A. That would practically stop fermentation at that time.

Q. That just holds them as they were?

A. Yes, sir.

Q. Now, then, if those berries were put in there in July and August and frozen and held in that frozen condition until October 29th, when you examined them, and found them bad, that condition related back to the time they were put into the cold storage, would it not?

A. I would not hardly think so.

Q. Well, if they were damaged when they were put into the cold-storage and frozen and kept there until the 29th, then you found them in the same damaged condition they were in when they were put in there, wouldn't you?

A. I didn't see them when they were put in there; I don't know anything about that; that was two years ago.

Q. I think you could answer that question, couldn't you, whether you saw them or not?

A. Yes, sir.

(Testimony of L. H. Huntley.)

Q. I will state it again; maybe I don't make myself clear. If the goods were put in there in the middle of July, first of August, were in a fermenting condition—I will use the word fermenting instead of damaged— A. Yes, sir.

Q. If they were in a fermenting condition—

A. Yes, sir.

Q. And were immediately frozen, say twenty-four to twenty-six degrees, along there somewhere, immediately frozen and kept in that condition until the 29th of October or about that time, when you [48] examined them, then they have been held from the August condition until the 29th of October by the freezing process, haven't they?

A. There should not be very much increase in fermentation during that time, no, if they were kept that cold.

Q. Then, if they were damaged, worthless as fruit, when you found them, the damage had occured by the fact of their having fermented before they were put into the freezer, isn't that right?

A. That I don't know.

Q. Well, that would be right if they were in a fermenting condition when put into the freezer?

A. If they were in a fermented condition—fermented condition, let me tell you, a fermented condition does not take place in a few hours, it takes several days for fermentation. No fermentation under the condition considered, you see, will take place in twenty-four hours. It takes several days for that, say seventy-two hours.

(Testimony of L. H. Huntley.)

Q. How long will it take berries to ferment if pounded down in a barrel?

A. About three days.

Q. Don't they begin to ferment at once as soon as they are mashed? A. No, they don't.

Q. You are a chemist? A. I am.

Q. And say that they don't begin to ferment at once when you mash them up?

A. Absolutely. I spent three years in fermentation experiments.

Mr. BOOTHE.—That is all.

Redirect Examination.

Q. Mr. Huntley, counsel asked you why, if these berries were fermented, you could not put sugar in them and bring them right back again to the same stage.

A. It is a different kind of sugar, Mr. Spencer. [49]

Q. Well, from the standpoint of food value, what happens when fermentation takes place; does anything happen to the cells of the berry?

A. Yes, you have nothing left but pulp; when your fermentation is complete you have only the shell of the berry. Sometimes it retains its original shape and sometimes it is broken to pieces.

Q. And is there any such thing as restoring, unscrambling or unfermenting a lot of berries after they have been fermented, by simply putting sugar in them? A. No, sir; you can't do that.

Q. Now, counsel asked you about supposing that these berries were fermented when they went in

(Testimony of L. H. Huntley.)

there and were then frozen and remained frozen for about a year and you went and examined them, whether or not the condition you found might not have been the result of the conditions they were in. Let me put this supposition to you: Suppose that the berries went in all right— A. Yes, sir.

Q. And along in the middle of August the temperature was allowed to go to thirty-six degrees and stayed there for four or five days, what would happen to the berries?

A. Very likely they would ferment; that would be the natural condition.

Mr. SPENCER.—That is all.

Recross-examination.

Q. Now, then, let's go back again, Mr. Huntley.

A. Yes, sir.

Q. Suppose that when they were put in there they were in a fermenting condition.

A. Yes, sir.

Q. And they were frozen and then a little later the temperature went up and they fermented again, which fermentation caused the [50] damage, the first or the second?

A. Well, when you have the beginning of fermentation you must have an increase in yeast plants and if you stop that fermentation soon after it has begun you have a small quantity or small number of yeast plants frozen; then if your temperature goes up you have a greater number of yeast plants to start in to work than you had in the original beginning, therefore, your fermentation will

(Testimony of L. H. Huntley.)

be faster in the second stage of the game than it would be in the first stage of the game.

Q. When those berries are put into barrels and mashed in the cells are all broken, or practically all broken, are they not?

A. Not necessarily, but if you smash a berry usually you break the cell structure of the berry.

Q. You have pulp then, do you not?

A. It is not necessary to have pulp for fermentation.

Q. Is that the proper way to pack berries? Do you know anything about packing berries?

A. I don't know anything about packing berries.

Q. You don't know anything about that?

A. No, sir, I do not.

Mr. BOOTHE.—That is all.

Witness excused. [51]

Testimony of G. M. Huffman, for Plaintiff.

G. M. HUFFMAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Huffman?

A. Six miles south of Salem.

Q. What is your occupation or business?

A. Raising berries; berry yard.

Q. You have a loganberry yard? A. Yes, sir.

Q. And about how large is that?

A. At the present time about four acres.

(Testimony of G. M. Huffman.)

Q. You had a yard in 1920? A. Yes, sir.

Q. How large a yard?

A. Six acres; I had one patch rented.

Q. You had one patch rented then?

A. Yes, two acres.

Q. During the season of 1920 did you sell loganberries to Mr. H. A. Baker? A. Yes, sir.

Q. Now, will you describe just how the berries are picked, getting them ready for accumulation at the packing plant of Baker, that season?

A. Well, in the first place the pickers have a little box that holds eight pounds—eight boxes, rather. They pick in that and then the grower checks them off when they get that full and carry these to the berry-shed.

Q. To the berry-shed?

A. Yes, under a roof—shed, you know.

Q. These little—these eight-pound boxes, they are made up of eight little boxes? [52]

A. Yes, sir.

Q. And are they these little veneer boxes that you see on the market down here with strawberries, or what not, in them? A. Yes, sir.

Q. And your pickers, you say, bring those into the shed on—

A. Most of them go and bring them in themselves.

Q. Bring them to the shed where they are assembled on your orchard?

A. They are taken out of them little boxes, then

(Testimony of G. M. Huffman.)

they put them into the crate which goes to the packing plant.

Mr. BOOTHE.—May it please the Court, I object to this testimony unless they can show that the berries that he picked were the berries in controversy.

Mr. SPENCER.—I will connect that up.

COURT.—I suppose that is what he intends to do.

Q. Did you sell your output of that season of 1920 to H. A. Baker? A. Yes, sir.

Q. And I understood you to say these berries were checked up by the grower after the pickers in his yard had gotten them together and they are put in a little shed? A. Yes, sir.

Q. Where they are kept? A. Yes, sir.

Q. Are they exposed to the sun or not; what is the fact about that?

A. Not any longer than what it takes to carry them in and pick them little boxes.

Q. Now, do you know whether the way you have described as having taken place on your yard is the general way followed around there by berry growers in the vicinity of Salem?

A. Yes, sir.

Q. In the season of 1920 did you have anything to do on your yard with being the receiver station for other growers of berries that [53] were going to Baker? A. Yes, sir.

Q. What was the fact about that?

A. I received there, we made a pool of in the

(Testimony of G. M. Huffman.)

neighborhood of sixty tons on the little patches surrounding me there. They brought them in to this one point and I weighed them up and their trucks came out and received them there in the evening.

Q. Whose trucks do you mean?

A. Mr. Baker's, or sometimes he had some other truck.

Q. Now, were you around there practically every day in that season of 1920?

A. I handled every tray, almost, that went out of there.

Q. And how long had you been in the loganberry business, how much experience had you had?

A. Eight years.

Q. What would you say, Mr. Huffman, as to the condition of the loganberries that were picked in your yard and the berries that came in to your place as a receiving station from the other growers around there—what was the condition of those berries in that season of 1920?

A. They were in good shape, good condition.

Q. And about how long does that season cover?

A. Well, it runs all the way from thirty to thirty-five days.

Q. And what have you to say as to the condition of the berries in the beginning of the season, compared with the condition of the berries at the close of the season, or year?

A. That depends a good deal on the weather.

Q. Yes, sir.

A. If you have hot days the berries get soft,

(Testimony of G. M. Huffman.)

and whether it is the first of the season or the last of the season.

Q. What I am getting at, whether there was any big difference between [54] the condition of the berries one week from those of another week in that season of 1920 that was brought to your notice? A. No, there was not.

Q. And then, as I understand you, the berries as they left that place were in what you have said good condition?

A. As good a condition as I ever handled any, because we had the best service that year of any time I ever had berries.

Q. Now, Mr. Baker's trucks you said picked up the berries from your yard?

A. How was that?

Q. You have already said, I believe, Mr. Baker's trucks came out and picked up the berries from your yard? A. Yes.

Q. And that included the berries that had been assembled there from the other growers, those sixty tons you have mentioned?

A. Well, he would come out with a big truck, if he could not take them out he would send out another truck that night or the next morning early.

Q. What is the fact as to whether or not he kept the berries cleaned up—gathered up?

A. What is the question?

Q. Were there large quantities allowed to remain on hand there a day or so?

(Testimony of G. M. Huffman.)

A. They were picked up as often as they possibly could.

Q. And were there any berries left there at night, running over into the next day?

A. No, never.

Q. Were the berries in that season of 1920—did they show any evidence of being unusually juicy, or what is the fact as to that?

A. No, I have seen it so that the juice would run out of the back of the trucks other seasons, which I never saw during that season. [55] Apparently held up better that year than other years, as we didn't have as hot weather. If the sun is real hot they will leak.

Q. After the berries were picked up and taken away by Mr. Baker's truck to his packing plant you saw nothing more of them? A. How is that?

Q. I say, after the berries left your place and went to Mr. Baker's packing plant you of course saw nothing more of them?

A. No, I was only in there once or twice.

Q. The berries, when would they be weighed?

A. They were weighed twice; I weighed them there as I received them and Mr. Baker, they had to weigh them down there to keep track of everything that went into the warehouse at that time.

Q. Did you check your weights with his?

A. Yes, sir.

Q. And was there any substantial difference between the weights?

(Testimony of G. M. Huffman.)

A. Well, they had a little more weight than I had.

Q. Well, there was no complaint on your part on that ground?

A. The only thing I could account for for that was that they weighed in bulk and I weighed in little weights, you see; they would come in maybe with ten or fifteen crates, I would weigh that. They would weigh a big bulk at one time.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Did you see any of the berries at the plant—the packing plant?

A. I was there twice, I believe, during the packing season.

Q. Did you see them putting the berries in barrels? A. I saw them put them in.

Q. How did they do that?

A. They have a table where there is a hole cut in the table, the [56] barrels go under this table, take a crate of berries and put a screen over the top —

Q. Screen?

A. A screen, yes, and they turn that crate right over and shake the berries out. That holds the hallocks back. The crate has twenty-four little boxes in it. They put that wire over that to hold these hallocks back, so that they won't come out and go into the barrel.

Q. Did you see them filling a barrel full?

(Testimony of G. M. Huffman.)

A. Not particularly, I never took particular notice of that.

Q. What did they do, beat them down, mash them down in the barrel, or —

A. I never saw them do that.

Q. You didn't see a barrel completely full, then?

A. I never did.

Q. You don't know whether they hammered them down, mashed them in or not, do you?

A. No, sir.

Q. Do you know whether they filled the barrel full or not?

A. No, sir. I merely walked through the plant, I didn't pay much attention to that part of it.

Q. You didn't pay much attention to what they were doing? A. No.

Q. The berries picked in the latter part of the season are usually a little more ripe and soft and ferment quicker than the others, don't they?

A. Well, along about the end it gets hotter and that causes the berries to leak; as far as fermentation is concerned I don't think it would affect them.

Q. The season of 1920 was a pretty hot season, wasn't it?

A. Yes, but it is pretty hard to get the pickers out in the hot part of the day.

Q. Pretty hard on the berries?

A. Yes, it is hard on them, sure. We never cared for our pickers [57] to go out in the mid-

(Testimony of G. M. Huffman.)

dle of the day, if they don't want to go out. We would rather they would go early and late.

Q. Sometimes when they were hauling them in trucks you say the barrels leak out of the cases?

A. I haven't seen any this particular year, because they picked them up too soon. I have had berries before that stood there for thirty-six hours, naturally the juice got away from the berry crates that time.

Q. Did the berries sometimes remain overnight before they were picked up?

A. Not to my recollection did they ever stay overnight. They would come out there as late as midnight to take those away.

Mr. BOOTHE.—That is all.

Redirect Examination.

Q. You say, Mr. Huffman, that you have seen berries other seasons, had them stand out thirty-six hours, as I understand. Was that other times other than this season you had seen them stand out thirty-six hours? A. Yes, sir.

Q. Was there any trouble about fermentation of those?

A. Not that you would notice. If you had cool weather they would not mould and if you had rainy weather they would mould.

Q. Those berries you had out thirty-six hours, did you have any complaint made by anybody that bought them that they fermented?

A. Never had.

Mr. SPENCER.—That is all.

Witness excused. [58]

Testimony of G. F. Heckart, for Plaintiff.

G. F. HECKART, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Heckart?

A. Seven miles south of Salem.

Q. Are you a loganberry-grower? A. Yes, sir.

Q. How big a yard have you? A. Six acres.

Q. Had that yard in 1920? A. Yes, sir.

Q. Did you sell your crop in 1920 to Mr. H. A. Baker? A. Yes, sir.

Q. And do you live out in the same direction as Mr. Huffman, or near him?

A. Well, Mr. Huffman lives a little southwest and I live directly south, on the State Highway. He lives a little west of me.

Q. Were you one of those whose berries were assembled at Mr. Huffman's place, or did yours go in direct? A. Mine went in direct.

Q. To Mr. Baker's plant? A. Yes, sir.

Q. Was that your first year of loganberries?

A. No, sir, I handled the loganberry business for about seven years.

Q. And you have a yard now? A. Yes, sir.

Q. Will you state whether or not you had occasion to observe the quality of the berries that Mr. Baker bought from you that year? [59]

A. Well, the truck that gathered up our berries

(Testimony of G. F. Heckart.)

usually had a route around on one side and gathered that way and so had berries when he came to our yard, had some berries on his truck, and as far as I remember I never seen anything wrong with the berries, they were in good shape.

Q. What have you to say as to the berries in your own yard that went to Baker?

A. Good; good.

Q. And was there any unusual bleeding of the berries that year?

A. No, sir, nothing unusual.

Q. Any unusual moulding of the berries that year? A. No.

Q. Were berries picked in the same general way and handled by the pickers as Mr. Huffman has described?

A. Generally the same; most everyone has about the same system.

Q. And what is the fact as to whether the growers generally have a berry-shed where they are assembled from the pickers? A. Yes, sir.

Q. And from what point did Baker's trucks pick the berries up, from the shed or—

A. From the shed; from the assembling-shed in the yard.

Q. What have you to say as to the service which Baker gave you in the way of trucks picking up berries in the season of 1920?

A. Excellent. They got our berries every day once a day; sometimes the trucks came around twice.

(Testimony of G. F. Heckart.)

Q. Sometimes twice? A. Yes, sir.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

What was the last dates that the berries [60] were taken from your place?

A. I just don't remember the dates.

Q. Well, how late in the season was it?

A. Well, he taken all our entire crop that year and our season usually runs we figure about sixty days.

Q. The last berries are usually riper and softer, are they not?

A. Not if you pick them at the proper time. You can get soft berries at any stage, if you want, or if you let them overripen. If you keep up you can get good berries the last as well as the first.

Mr. SPENCER.—Did you keep up with the picking?

A. We had pickers there, sure, all through the season.

Witness excused. [61]

Testimony of Clifford Smith, for Plaintiff.

CLIFFORD SMITH, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

What is your business, Mr. Smith?

A. Work on my father's ranch.

(Testimony of Clifford Smith.)

Q. Work on your father's ranch?

A. As a rule, yes.

Q. What were you doing in the loganberry season of 1920? A. I drove one of Mr. Baker's trucks.

Q. Where did Mr. Baker's truck run, that you drove?

A. Well, it ran nearly every place there was berries.

Q. And what work were you doing with that truck?

A. Well, I drove a small truck and I picked up the berries that the larger trucks—where they were overloaded or didn't get it.

Q. Did you have a regular route?

A. Not usually.

Q. What did you do; how did you fill in?

A. I went wherever Mr. Johnson told me to.

Q. Who was Mr. Johnson?

A. Well, he was managing the trucks.

Q. For Mr. Baker?

A. For Mr. Baker at that time, yes.

Q. And where would you leave in the morning, for example, with your truck; from what place would you go? A. From home.

Q. And you would go to whatever place Mr. Johnson would tell you to go, to get berries?

A. As a rule, my father sold berries to H. A. Baker and I lived right close to Mr. Johnson and he had a patch and as a rule I took [62] one in from those two patches in the morning.

(Testimony of Clifford Smith.)

Q. And then you went in and got berries wherever you were directed to get them, is that the idea?

A. Wherever Mr. Johnson told me to.

Q. Will you state whether or not you worked during the entire season of 1920 picking up Mr. Baker's berries that he had purchased from the growers? A. I did, yes.

Q. You would get these berries from what places on the growers' yards? A. From sheds.

Q. And would you make more than one trip, sometimes, to one grower's place a day?

A. If there was more than one load of berries.

Q. Now, did you have occasion to look at the berries during that season of 1920?

A. I looked at every crate I put on there.

Q. Do you know anything about loganberries?

A. Well, some.

Q. Your father grows them? A. Yes, sir.

Q. Well, will you say what was the appearance of the berries as to whether they were hard or firm or soft, or what?

A. When it was cool they were hard; in the heat of the day sometimes they would be soft, some, and run to some extent.

Q. But was that condition that you observed there any different than that that took place in the summer season when it is reasonably warm?

A. It does it every time.

Q. And were there berries left over? Were the berries picked up, cleaned up, each day from the various yards? [63] A. Yes, sir.

(Testimony of Clifford Smith.)

Q. In order to do that was there any particular hours observed by you in driving the truck?

A. I worked all hours.

Q. Picked up any berries at night?

A. Certainly did.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Did you see them packing any of these berries down at the plant?

A. I walked through the plant sometimes, but I paid no attention to that, whatever.

Mr. BOOTHE.—That is all.

Witness excused. [64]

Testimony of G. W. Johnson, for Plaintiff.

G. W. JOHNSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Johnson?

A. About seven miles and a half south of Salem.

Q. You lived there in 1920? A. Yes, sir.

Q. And what business are you in?

A. I am raising fruit; berries, prunes.

Q. And in the season of 1920 were you also employed by Mr. Baker? A. Yes, sir.

Q. How big a yard do you have—did you have then?

(Testimony of G. W. Johnson.)

A. I have about twelve acres in loganberries.

Q. Had you operated that yard the year before?

A. Yes, sir.

Q. And you operated it since? A. Yes, sir.

Q. What work did you have, if any, around the packing plant of Mr. Baker during the season of 1920?

A. I had bought berries for Mr. Baker for a number of years.

Q. You did what?

A. I bought the berries for Mr. Baker in 1920.

Q. For him?

A. Yes, for Mr. Van Doran, and during the season I took care of the trucks, sent the trucks out to gather in the berries, and I was around the plant all the time.

Q. And in addition to looking after the truck end of it, from Mr. Baker's end, did you have occasion to go out on your own yard at times?

A. I was home every evening. [65]

Q. You were home every evening.

A. Every evening; then I went out amongst the other growers.

Q. Now, would you say that you had been over the various yards? A. Oh, yes.

Q. That Baker bought from during the season of 1920? A. Yes, sir.

Q. What, Mr. Johnson, was the general condition of the berries that Baker bought and took into his packing plant during the season of 1920?

A. Very good.

(Testimony of G. W. Johnson.)

Q. I wish you would describe what you know about the service that was afforded in picking up the berries, how often they were gathered in by the trucks that Baker provided, from the various growers.

A. Well, we tried to gather them in every night. We generally start the trucks out about eight o'clock in the morning. During the busy part of the season we had about seven trucks; we had three of our own and hired four others. We aimed to just keep them picked up. For instance, one man would go out and he came in, I asked him if he got all on that load, that particular grower, and if he didn't I would send another truck out and follow him up. I would stand on the platform and send them out. Mr. Smith had a small truck. In case somebody was off one of the roads I would shoot him out. My idea was not to save expense in getting the berries in.

Q. That service, picking the berries up yourself, from the packing plant, is that usually performed by the packing plant?

A. It was that year. The year before I think we hauled berries, too.

Q. How about last year?

A. We didn't bring them in.

Q. How did the packing plant get the berries last year? A. Last year we didn't pack. [66]

Q. But the seasons before, did the growers bring the berries in themselves?

A. The growers brought them in themselves.

(Testimony of G. W. Johnson.)

Q. Do you know what the practice is now?

A. They bring them in themselves.

Q. While you were picking them up with your own truck, would that—was it any quicker service than when the growers brought them in themselves, or not? A. I think it was.

Q. And as I understand you, from your observation of the berries in that season of 1920 you found no fault with them? A. No, nothing.

Q. You were around the plant a good deal?

A. That year?

Q. Yes. A. Yes.

Q. Did you have occasion to observe as to how quickly they got under way in packing the berries when they came in on Baker's trucks to the packing plant?

A. Yes, we kept them going as fast as they would come in, pack the ones that came in the load before and keep working them up; evenings I think we had them all. Sometimes there might have been a few left over.

Q. In the packing plant?

A. In the packing plant. I went home about six o'clock and I think they worked until eight o'clock.

Q. What do you mean by packing the berries?

A. Putting them in the barrels.

Q. When they were put in the barrels, how big were these barrels?

A. Well, we are putting in now about four hundred and fifty pounds strawberries. I don't *think*

(Testimony of G. W. Johnson.)

put in quite so many loganberries; I [67] am not sure.

Q. What was done with the barrels when the berries were put in there?

A. The Willamette Valley Transfer brought them to Portland.

Q. The Willamette Valley Transfer brought them to Portland? A. Yes.

Q. And were you around there when the Willamette Valley Transfer would pick up the berries?

A. Yes, sir.

Q. How often would they take the berries from the packing plant and bring them into Portland?

A. Early in the season when we had a few barrels they would come and take them as we had them; later in the season, when we got up to so many they had a trailer and truck and when we got twenty-five or thirty barrels we would call them up to load. I think they put about twenty on a truck, maybe twenty on a trailer; maybe not quite that.

Q. Did you see any fermenting of barrels or spoiling of berries around Baker's packing plant that season of 1920? A. No.

Q. How often were you there at the packing plant?

A. I was there about all the time during the day. I was out and in.

Q. Do you know, assuming that the berries would be hauled to Portland in about four hours, what would be the average time, would you say, from the

(Testimony of G. W. Johnson.)

time the berries were picked until they got into the cold-storage plant at Portland?

A. Well, it would be pretty hard to say. I imagine, for instance, the berries were picked in the morning you would get them in Portland that night. Oh, I should say maybe twenty-four hours. I don't think many laid out longer than that, if any, from the time they were picked.

Q. You have had experience in handling berries?

[68] A. Yes, sir.

Q. And you know what length of time you can handle them in that way and not have them ferment?

A. Well, I would not know how long you can handle them in that way and not have them ferment —just how long it would take them to ferment.

Q. Well, have you handled berries in other times longer periods than that in safety, without fermenting?

A. Oh, yes. Well, two years ago the berries didn't come in as good shape as they did that year. That is 1919.

Q. 1919?

A. We didn't get the service from the Willamette Valley Transfer that year and we didn't give the growers the service—didn't have so many trucks.

Q. Was there any difficulty, so far as you know, with fermenting of berries that year 1919?

A. No, sir.

Mr. SPENCER.—Cross-examine.

(Testimony of G. W. Johnson.)

Cross-examination.

(Questions by Mr. BOOTHE.)

What was the process used by Mr. Baker's men up there in packing those berries in barrels?

A. He just put them in the barrels.

Q. Filled the barrels full? A. Yes.

Q. Did they tamp them down?

A. No, we didn't stamp them; we had something like a—what I would call a churn dasher, just simply to smooth the berries off; we didn't mash them.

Q. Didn't they have a thing about eight inches square to beat them down in there, mash them up?

A. No. Yes, sir. [69]

Q. They didn't have? A. What is that?

Q. You say they didn't have that?

A. Yes, they had that; I say they used that simply to level the berries off, not hammer them down.

Q. They used it, then, in beating them down, that had a tendency to break the cells of the berries, wouldn't it?

A. You might say it would, in some cases.

Q. Filled the barrels pretty full before they headed them up?

A. Not as full as we are filling them now with strawberries.

Q. Now, Mr. Johnson, if it should happen—I am not saying it is true, but suppose these berries you are speaking of which were taken by the Willamette Valley Transfer, were fermenting when they were taken to Portland, what would cause that?

(Testimony of G. W. Johnson.)

A. I don't know. I don't know why they should ferment that quick.

Q. Should they have been fermenting by the time they got to Portland the way they were handled?

A. No, they should not.

Q. If we can show they were fermenting when they came here there was something wrong somewhere, wasn't there?

A. I suppose there would be, but there wasn't anything wrong so far as I know.

Q. There would be something wrong in the berries? They would be too ripe?

A. I don't think they were too ripe; not as ripe as they have been in former years.

Q. Were any berries that you had brought in by these trucks moulded? A. No.

Q. Did you examine the berries closely?

A. No, I have seen the tops of the berries when they came in; I didn't examine the berries. [70]

Q. That wasn't your business, to examine the berries, was it? A. No.

Q. Pretty warm season, wasn't it?

A. I don't think it was exceptionally warm, not more than usual; might have been; I don't just remember.

Q. Were they doing anything else besides barreling these berries?

A. That is what we were doing at that place.

Q. Weren't they canning there, too?

A. No, Mr. Kurtz, that was canning, was right

(Testimony of G. W. Johnson.)

across the railroad track. We took some berries over there.

Q. That was for Mr. Baker, wasn't it?

A. That was for Mr. Baker.

Q. They were canning some and barreling the others, isn't that right? A. Yes.

Q. Some of those you saw brought in, some went to the cannery and some were barreled?

A. Sometimes we would send two loads a day or three loads a day to the cannery.

Q. Was there any difference in the selection of what went to the cannery?

A. When I was there I usually picked out the growers that had the nice, big, larger fruit to send over to the cannery.

Q. The largest ones went to the cannery?

A. So many growers have large patches. Now, for instance —

Q. A great many went to the cannery?

Mr. SPENCER.—Let the witness testify.

A. The largest fruit went to the cannery, the cleanest fruit.

Q. And they were canned right there?

A. They were canned right there.

Q. Did any of those blow up? A. Yes. [71]

Q. How many? A. I don't know.

Q. There was a terrible lot of them blew up, didn't they?

A. I think they had some troubles with their top.

Q. What?

(Testimony of G. W. Johnson.)

A. With the tops, their quarts. I was only in the cannery about once or twice.

Q. Isn't it a fact there was a regular cannonading, blowing up of cans that had been canned there?

A. I don't think so. I never worked around the cannery, but I imagine all canneries lose some fruit.

Q. Well, throughout the whole season wasn't the wall covered?

A. No, I don't think you would—

Q. I will ask you, wasn't about ten thousand dollars worth of those cans blown up.

A. I am satisfied they didn't. I don't know how many.

Q. There was a large quantity of them blew up, wasn't there?

A. There was some blew up; and the same year we let Wittenberg-King have a lot and they packed them right there.

Q. How long were they in the can before they blew up? A. The berries?

Q. Yes. A. I don't know.

Q. What was the cause of them blowing up?

A. I don't know that, either. I heard somebody say something the matter with the tops of the cans, had the wrong tops.

Q. The can wasn't strong enough to contain the acid in there, that is about the size of it?

A. I don't think so; I think it was the top.

Q. If the berries had been all right it would not make any difference what kind of a top it had, they would not blow up? [72]

(Testimony of G. W. Johnson.)

A. I think it would have, the way I think.

Q. If the berries were all right?

A. I think they would, yes. I think they would blow up. I imagine it would be just like larger fruit of any kind, blackberries, open them up, they will spoil, ferment.

Q. Did you ever hear of any of those barrels blowing up before they got to Portland?

A. No, I never did.

Q. Did you ever hear of any of those barrels fermenting before they got to Portland?

A. No, I never did.

Q. You never saw them after you got them in the plant there? A. No.

Redirect Examination.

Q. These berries you say were canned in that canning factory, who ran that?

A. Kurtz ran that.

Q. A man by the name of Kurtz?

A. A man by the name of Kurtz.

Q. You don't understand Mr. Baker had a canning factory?

A. Understood he had that along toward the latter part of the season and we took some of the fruit from the platform over to that.

Q. Do you know the reason why the larger, firmer berries might be selected for canning, whereas they might not be selected to go down in the barrels?

A. Ordinarily in the cannery you sort over a berry crate, and they told me to take the nicest, we had some exceptionally nice, well cultivated yards,

(Testimony of G. W. Johnson.)

they are large, any of those came in we were to send them.

Q. Do you understand berries ordinarily canned could be inspected, looked at, and therefore they would select larger berries? [73] A. Yes.

Q. Whereas berries put in barrels, is there any opportunity for inspecting them after you get them in barrels?

A. I never seen any of them.

Q. This business of the cans blowing up there in Kurtz's canning factory, I guess you said you didn't know what caused it?

A. I don't know, unless it was, some said they had had tops—they sent for the wrong kind of tops to their can. I don't know anything about canning fruit. It is just hearsay.

Q. Did you see any berries that came in there that year of 1920 that were too ripe to handle?

A. No.

Q. And you have been in the berry business how long before that?

A. I have been in the berry business about seven or eight years.

Mr. SPENCER.—That is all.

Recross-examination.

Q. There was a man there, a chemist by the name of Professor Van Eschen, or some such name as that. Do you know him? A. Yes.

Q. Did I pronounce his name right?

A. That is about the name. I know him.

(Testimony of G. W. Johnson.)

Q. Something like that. He was a kind of superintendent over there?

A. He was over at Kurtz's. I saw him over at Kurtz's.

Q. Do you know, as a matter of fact, that he condemned a lot of those berries that came in there and would not let them put them in barrels at all?

A. I don't know that.

Q. You don't know that he condemned a lot of them that were mouldy and would not let them put them in? A. No, I don't know.

Q. Do you know whether any of them were condemned? A. No. [74]

Q. Could it have been done without your knowledge?

A. Yes, I wasn't at that plant much of the time.

Redirect Examination.

Q. This man Kurtz operated a cannery there; did he buy loganberries too? A. Yes.

Q. How did he get his loganberries in from the growers, did he furnish this truck service like Baker?

A. I don't remember whether he did or not; no, I don't think he did, I think the growers hauled their berries in to him. I am not sure.

Q. And he had berries there that he had picked up around one place and another? A. Yes.

Witness excused.

Testimony of L. B. Gregg, for Plaintiff.

L. B. GREGG, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Gregg? A. Salem.

Q. And what is your business?

A. Well, for the last four years winter time I attended the Oregon Agricultural College, and summer I worked for the H. A. Baker Company at Salem.

Q. Were you working for Mr. Baker in the loganberry season of 1920? A. Yes, sir.

Q. What were you doing there?

A. I was receiving and weighing the fruit.

Q. Receiving and weighing the fruit?

A. Yes, sir. [75]

Q. And just what were your duties in that respect?

A. Well, every truckload of berries that came in, backed up to the platform and loaded onto smaller platforms, be trucked over to the scales and I would weigh them and take the weights and my helpers would take them on to the dumping tables.

Q. And in doing that work, Mr. Gregg, did you have occasion to see what berries were coming in there and what their condition was?

A. Yes, sir, I had a very good chance to see everything.

(Testimony of L. B. Gregg.)

Q. You say you had been in that work how many years before?

A. I worked for Mr. Baker—for the H. A. Baker Fruit Company, for four years, and I have worked in canneries three years previous to that.

Q. And during that time you, I suppose, have had occasion to see a good many barrels of loganberries? A. Yes, sir.

Q. Will you state what was the condition of these loganberries that Mr. Baker gathered up from the growers as they came into the packing plant?

A. Why, the berries that were brought in that season were very good, in comparison with previous years that I had anything to do with loganberries. I would say it was the best year that I ever saw loganberries.

Q. Do you know as to the methods provided by Mr. Baker for gathering them up that year?

A. Yes, sir.

Q. And did that speed up matters as to delivery to the packing plant?

A. Yes, sir; that helped.

Q. Would you say that, from your observation of those berries in that season of 1920, that there was any quantity of them, any of them, that were spoiled or that were overripe or anything of that sort? [76] A. No, sir; there was not.

Q. Now, after the berries left your hands when they were weighed, what was done with them?

A. They were trucked on down to the warehouse, where the men who put them in the barrels were at

(Testimony of L. B. Gregg.)

work, and they would take them there and put them in the barrels.

Q. What were they in when you got them to weigh them?

A. They were in the crates, hallock crates.

Q. What is the twenty-four—what do you call them?

A. Twenty-four hallock crates, small boxes, market boxes, twenty-four of them to a crate. These were loaded on to a small platform that would hold approximately thirty crates, a small iron truck was wheeled on to the platform, hoisted up and the truck carried to the scales and the truck also—the platform also, and the iron truck pulled out from underneath it, weight taken, the tare taken off the crates.

Q. That is the weight of the crate?

A. That is the weight of the crates and the platform which is holding it.

Q. That would be deducted from the total weight so as to get the net weight of the berries?

A. Yes, sir.

Q. Now, these twenty-four little boxes, were they piled on top of each other, or were they all flat?

A. Oh, the twenty-four were all full, open in the crate.

Q. So that did you have opportunity to see the tops of those twenty-four small boxes of berries?

A. Yes, sir.

Q. As you weighed them. Who took the berries, what was the job of the next man beyond you after

(Testimony of L. B. Gregg.)

you weighed them? Somebody take them and put them in the barrels?

A. Yes, that was the next step in the process, was putting them [77] in the barrels.

Q. And do you know about how often the berries were picked up by the Willamette Valley truck men after they were put in the barrels for transportation to Portland?

A. Yes, I was on the platform all the time.

Q. And will you just describe about how often that was done?

A. Well, it was done just as often as we would let them come. They were very anxious to get the patronage of this firm. The barrels were very easy things to haul. The bulk and the weight mounts up very fast, the easiest thing to haul for the weight, probably that there is, is barrels. These men wanted to haul them, were anxious to haul the berries. I think approximately five minutes after we telephoned to the firm that the trucks would be down there backing up to our platform, getting ready to take the barrels.

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Did they put any ice in the barrels to keep them cool? A. Yes, sir.

Q. In all of them? A. I believe they did.

Q. How much ice did they put in?

A. Well, I am not sure about that year. There

(Testimony of L. B. Gregg.)

before that year they had put in some ice. Yes, they put in ice that year, too.

Q. You said they put in ice during that year?

A. Yes, they put in ice.

Q. 1920. Don't you know there was a law passed they could not do that in 1920, wouldn't allow that in 1920? A. No, sir, I don't know that.

Q. Isn't that right? I want to be correct on that?

A. I am not sure. I am sure I don't know whether there is any such law. [78]

Q. Of course I didn't want you to be sure about the law, but the facts are what I want you to state. You say they did put ice. A. Yes.

Q. And how much?

A. I don't remember now. I never measured.

Q. Did they put ice in every barrel?

A. Yes, must have, if that was the year that I am thinking of, it has been two years and I worked for this firm for four years. I believe that is one of the years we put ice in the barrels.

Q. What part of the barrel would you put the ice in? A. Put it all through.

Q. Just through it, here and there?

A. No, distribute it through, three different times, I believe. I used to do that job myself, is the reason I know. This year I had no occasion to see the barreling process, only from a distance. Two years before, when I first started to work I did that work. I can tell you how I did it that year. I put in three boxes of ice to every barrel of berries. It was dis-

(Testimony of L. B. Gregg.)

tributed through the barrels so it would be approximately an even layer of berries between each layer of ice.

Q. Ice cracked up? A. The ice was cracked.

Q. In packing those barrels did they tamp them with a maul or something—in packing the berries in barrels did they hammer it down with a maul?

A. They had this leveler they speak of. I would not call it a maul. I forget what the boys did call it, They had a stick.

Q. How big was it?

A. I think it was made out of a broomstick.

Q. How big was the bottom of it, where they leveled? A. That was probably a foot long.

Q. And how wide? A. About four inches. [79]

Q. Some like a 4x4, was it, fastened to a broom handle? A. Four by four?

Q. Yes, you say about a foot long and four inches wide.

A. It wasn't four inches thick, it was about 4 by 1.

Q. How is that?

A. It was about four inches by one inch thick—about one inch thick, four inches wide and a foot long.

Q. And an inch deep?

A. You are speaking of the part on the end, I presume. I said the broom handle was what it was fastened on to.

Q. What was the weight of that thing they hammered it down with, then?

(Testimony of L. B. Gregg.)

A. Probably two pounds.

Q. About three pounds?

A. Two pounds, pound and a half or two pounds.

Q. How did they do, come down on it hard enough to mash them up, or not?

A. Why, I think they did, yes.

Q. The berries were made into a pulp, were they not, intended to be made into a pulp?

A. No, not intended to be made into a pulp, just simply to get the berries to settle.

Mr. BOOTHE.—That is all.

Redirect Examination.

Q. Was this business of packing the berries in the barrel, was that done that year substantially as it had been done years previous?

A. Yes, sir; the same.

Mr. SPENCER.—That is all.

Witness excused.

Testimony of Dave Adolph, for Plaintiff.

DAVE ADOLPH, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows: [80]

Direct Examination.

(Questions by Mr. SPENCER.)

Your name is Dave Adolph? A. Yes, sir.

Q. Where do you live? A. Salem, Oregon.

Q. And how long have you lived up there?

A. Practically seventeen years.

Q. What were you doing in the season—loganberry season of 1920?

(Testimony of Dave Adolph.)

A. I was barreling loganberries for Mr. Baker.

Q. You will have to talk so the jury can hear you.

A. I was barreling loganberries for Mr. Baker.

Q. Who was working with you?

A. My cousin Rex Adolph.

Q. What was your job in the packing plant there?

A. My job was to take the full crate of loganberries, put the screen over it and dump them into the barrel and then I took the empty crate, give it to my cousin outside and he was stacking them up and after I had barreled practically five or six barrels, why, he would take a turn at it.

Q. And you took them after they had been weighed by Mr. Gregg? A. Yes, sir.

Q. And did you work there the entire season of 1920? A. Yes, sir.

Q. And did you have occasion to see practically all of the berries that Mr. Baker bought that went through the packing plant and were packed?

A. Yes, sir.

Q. Now, what would you say, Mr. Adolph, as to the condition of the berries that you saw there as you worked with them day by day that season?

A. I think the berries were in very good condition.

Q. Did you notice any quantities of berries there at all that seemed to be overripe or mouldy, or anything of that respect?

A. No, I would not see any quantity.

Q. Just describe, will you, again, how you packed the barrels, put [81] them into the barrels, what was done?

(Testimony of Dave Adolph.)

A. We had a long table that had a hole in it, and the hole was not quite as large around as the top of the barrel and the barrel would fit on a little truck, would fit under this table and we had little square frames, they had us make four wires running lengthwise of them and possibly four or five running the width of them; they were very large wires and the wire was set over the crate, the crate was put upside down over the hole and the berries were jarred out and these wires helped to hold the little hallocks, the little market boxes, in the crate.

Q. Helped hold them from going down into the barrel?

A. They kept them out of the barrel.

Q. And how full would you fill up the barrels?

A. Well, we were supposed not to fill them too full, within about three to four inches of the tops; there is a little groove about one-half inches from the top and put them about two inches from that, as the head of the barrel fits that.

Q. Now, these berries brought into Mr. Baker's packing plant there, what have you to say as to whether or not they were kept inside in the shed while in the packing plant?

A. They were brought on the platform and as much as I could say were immediately hauled to the scale and from there were brought immediately to the table where I was and dumped in the barrel.

Q. What is the fact as to whether or not you kept up with the operation? That is, as soon as they

(Testimony of Dave Adolph.)

were weighed, did much time elapse before you got them and put them in the barrel?

A. No, not much time, the berries never stood in the plant while we were working over two hours, or an hour.

Q. Then who took charge of the barrel after you put the berries in?

A. Well, then we took a hook and dragged the barrel over to a man we call the cooper and he put the head in the barrel.

Q. He did that work, did he? [82]

A. He did that work.

Q. You had nothing to do with the coopering the barrel? A. No.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

You said something about you didn't see any great quantity of overripe or mouldy berries; did you see any?

A. Why, bad berries, I remember seeing maybe just a few in maybe the bottom of a box, to the last.

Q. What did you do, put them in the barrel?

A. No, threw them out; we didn't barrel any bad berries at all; threw them out.

Q. They were canning some berries that came in at the same time, were they not?

A. I do not know anything in regard to the canning.

Q. Don't you know they took some berries over to the cannery and some to the barrels?

(Testimony of Dave Adolph.)

A. Yes, I know they took some to the cannery.

Q. Some of these same truckmen took them over there, did they? A. I don't know.

Q. Who took them over to the cannery?

A. I don't know.

Q. Were they sorted out and good ones taken to the cannery? A. I do not know.

Q. Was any ice put in the barrels?

A. I think Mr. Gregg made a mistake; there was no ice put in that year.

Q. About their mashing the berries down in there, was he correct—was Mr. Gregg correct about that, about the way they hammered them down in there?

A. I don't remember what he said, sir.

Q. How did they do that?

A. He wasn't quite correct in his statement of the thing we used [83] to level them off. It was round rather than—more oblong shape and it was used to level off the berries. When you are passing this crate over the hole and the berries come out, it has a tendency to fill out in the middle and not on the sides.

Q. You put some weights to shove them out?

A. Any more than to level them out.

Q. When you put the berries in the barrels, did they get mashed up in that process? A. No.

Witness excused.

Testimony of George N. Ireland, for Plaintiff.

GEORGE N. IRELAND, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Ireland, you are a little hard of hearing?

A. I am a little hard of hearing.

Q. Well, I will talk as loud as I can and if you can't hear me you tell me so. You live in Salem?

A. Yes, sir; 1092 Broadway.

Q. How long have you lived up there?

A. I have lived in and around Salem for twelve years.

Q. And what were you doing in 1920?

A. I was working the summer season for Mr. Baker.

Q. Working for Mr. Baker; and what did you have to do with his packing plant, what were your duties there?

A. Well, I was working under Mr. Van Doran.

Q. The jury cannot hear you, Mr. Ireland, I think.

A. I was working under Mr. Van Doran, to see and take care of the plant, look after it while he was absent, or even while he was there. [84]

Q. Mr. Van Doran was in charge there then for Mr. Baker? A. Yes, sir.

Q. You were working with and under Mr. Van Doran?

(Testimony of George N. Ireland.)

A. Working under Mr. Van Doran's instructions.

Q. Had you worked previous years for Mr. Baker? A. Yes, sir.

Q. How many years?

A. I think I began with Mr. Baker 1917, the Fall of 1917, I think.

Q. And did you work for Mr. Baker in the season of 1920? A. Yes, sir.

Q. That was—are you working for Mr. Baker now, this present season? A. Yes, sir.

Q. Now, just describe to the jury what your duties were about there, how much you were about the plant and what you did.

A. Well, I was at the plant all through the season, all through the berry season and I was what you might call the boss; I would discharge men, lay them off, and seen after the business in full, as far as that is concerned.

Q. Did you have occasion, Mr. Ireland, to see many of the berries that came in, as they came in from the growers' yards? A. Yes, sir.

Q. And how much opportunitey did you have for such inspection?

A. I had all, I guess, because that was my business, to see after those things.

Q. And what would you say was the condition of the berries that came in from the growers in that 1920 season? A. I call them good.

Q. Now, what is the fact as to whether or not they were picked up with reasonable promptness by the trucks from the growers' yards?

(Testimony of George N. Ireland.)

A. Well, my job was in the house; I knew nothing about the outside work.

Q. Well, sir, when they came into the packing plant, then, what was [85] done with them as to getting them packed and how much time was consumed, generally, at that job?

A. Well, that depended. I have sent berries out, after they were put in the barrels, I have had them out on the road, I suppose, for the cold storage in less than an hour, and then of course others took longer. For instance, after work hours come, the berries would come in and would be worked up early in the morning. I had no occasion to hold old berries over or to work stale berries, simply because we were letting Wittenberg-King have berries, fruit, at that time, and I had no occasion to hold old berries, for if I saw I was going to get overstocked, anything of that sort, they were shipped to Wittenberg-King.

Q. Where was the Wittenberg-King Plant?

A. They were located south of where we were.

Q. That was right there in Salem?

A. Yes, three or four blocks.

Q. So, as I understand you, if any berries were left over that could not go on the trucks that night you shipped them to Wittenberg-King?

A. I had no occasion to use old berries, if I saw I was liable to get overstocked they were weighed out and shipped over to Wittenberg and King.

Q. Do you know as to the service that was given by the Willamette Valley Transfer people in truck-

(Testimony of George N. Ireland.)

ing the stuff away from the plant and getting it to Portland? How often did they come around?

A. They came whenever we called them and we tried always to call them before we had got a load for them. As a—generally speaking they were waiting for the last barrel of their load to be put on the truck.

Q. Assuming that the Willamette Valley Transfer people would get those barrels down to Portland to the cold-storage plant within four hours of the time they got them from you, about how long [86] would it have been between the time the berries were picked until they got in cold storage, on the average?

A. Oh, I will only answer that question how long they were in the house.

Q. All right, how long were they in the house, how long from the time they got in the house until they got in cold storage?

A. I have had them after they got in the house in cold storage in five hours—less than five hours, and some twelve hours, when they got in at night after the work was quit and got them the next morning.

Q. Were many carried over?

A. In the barrel?

Q. Yes.

A. None; there wasn't a barrel stayed in the house over night.

Q. Do you know the kind of trucks—the equipment, that the Willamette Valley people used to bring them down to Portland in?

(Testimony of George N. Ireland.)

A. Well, not particularly. They used hoists in their trucks, covered trucks.

A. That is what I am getting at: how were those trucks constructed, as to protecting the berries until they got here?

A. They were frame, some of them canvass tops and wooden sides and back and all closed in.

Q. You say they were all closed in?

A. They were all closed in.

Q. You would see the loads as they were made up there, before they left the packing plant?

A. I didn't quite get that.

Q. Did you see the truckloads as they were made up at the packing plant and before they left?

A. Oh, yes, indeed, I saw them. They were all loaded and got out in good shape. I often, myself—I never had a barrel leave the plant laying down. I made them put them on edge, haul them heads up. [87] I know I had one driver unload, I went out while he was loading and he had some barrels laying down and I had them unload them and put them on edge, heads up.

Q. Why would you have them loaded with heads up?

A. Because in riding the stave, if there was pressure, anything of that sort, the stave of the barrel would be liable to get sprung and with heads up there is no danger.

Q. Now, Mr. Ireland, just describe to the jury what these barrels were like; what kind of barrels were they.

(Testimony of George N. Ireland.)

A. Well, you mean what kind of wood?

A. Yes, what are they made out of, how were they made?

A. I suppose they are made of fir; I should think so; I have no authority for that.

Q. How big are they? A. Fifty gallon.

Q. And do you know anything about the inside construction? Are they—

A. They are paraffined all nicely inside.

Q. Paraffined inside; what is that for?

A. That is to make them air-tight, I suppose.

Q. And the heads; how are the heads constructed?

A. I didn't get that exactly.

Q. Well, the head of the barrel, is that a solid piece of board, or how thick?

A. Well, it is supposed to be solid; of course there are seams in the head, and they are what is called—

Q. Grooved?

A. No, pegged together. They are jointed and pegs in them to hold them. Whenever they are coopered down, as they are supposed to be airtight, and I saw them; there were no leaks in the barrels before they left, for I tested, or had tested, every barrel that was put up. I had it turned down on its side, rolled on its side, so as to see [88] if there was leaks in the head. If I found a leak in a barrel, any juice came out, it was either re-barreled and fixed so that leak was stopped before it left.

Q. Did you see any loganberries there in that

(Testimony of George N. Ireland.)

season of 1920 that were fermenting that went into those barrels?

A. There wasn't fermented before they went in and I am sure after they went in there, of course they went out in good shape.

Q. Were there any barrels before they left the packing plant they were swelled heads, or burst out, anything of that sort?

A. Never had a barrel burst in the plant; never did.

Q. Do you know how long you can keep loganberries after they are packed and before putting in cold storage without fermenting?

A. Oh, no, I ain't posted.

Q. Now, these berries that were picked at the various growers around Salem all went through this packing plant of Mr. Baker's as you mentioned?

A. You mean that he didn't have any other packing plant?

Q. Yes.

A. No, I don't think so; that was the only big plant I guess Mr. Baker had there.

Q. Do you know about how many barrels he had packed and sent to Portland that year of 1920?

A. I think it was around sixteen hundred, more or less; around sixteen hundred.

Q. Now, when did you next see any of those barrels of Mr. Baker's after they left the packing plant? A. How is that?

Q. When did you next see any of those barrels of loganberries after they left the packing plant?

(Testimony of George N. Ireland.)

A. I came down to Portland on the sixteenth of August and went to the cold storage.

Q. Who were you with? [89]

A. Well, indeed, I won't tell you now. I brought a gentleman down that worked for me to see after this business, but I disremember his name.

Q. Was Mr. Van Doran along?

A. Mr. Van Doran was down.

Q. You went over to the cold storage plant?

A. Yes, sir.

Q. Where did you go, over there?

A. I went into the basement and went into the cold storage and where those barrels were.

Q. What condition did you find the barrels in on the sixteenth day of August in the cold-storage plant?

A. I found them thawed out; found a great many of them in very bad shape.

Q. First of all, did you observe the temperature in the cold-storage plant on the sixteenth of August?

A. I found it hovering around thirty-six above.

Q. How long were you there, Mr. Ireland?

A. I was in there on the sixteenth and seventeenth. I came out I think somewheres around four o'clock on the seventeenth, that is.

Q. And what time did you go in on the sixteenth? What time did you go in?

A. Well, we came in from Salem, it must have been between ten and eleven o'clock, somewheres around there; we came from Salem that morning.

(Testimony of George N. Ireland.)

Q. Did you spend the afternoon there?

A. Yes, sir.

Q. And you were there the next day until about four o'clock? A. Yes, sir.

Q. Seventeenth of August. On the seventeenth of August you were there until about four o'clock in the afternoon? A. Yes, sir. [90]

Q. And was the temperature hovering around thirty-six all of that time?

A. When I left there on the seventeenth, evening, why, they were getting a little bit of frost on the pipes.

Q. On what?

A. Getting a little bit of frost on the pipes.

Q. Now, just describe to the jury something about the way these pipes were and how the room was located there.

A. Well, I suppose that you gentlemen know that those pipes run through the refrigerator—that is through the cold storage, and whenever the cold storage is doing its duty those pipes are all covered with ice and frost.

Q. When you went there on the sixteenth what was the condition of the pipes as to whether there was any or much frost on them?

A. There was no frost on the pipes.

Q. Well, now, what did the barrels look like when you went there? Tell the jurors what appearance they had?

A. They was barrels that I re-headed and refilled, that had blowed out, and blowed out the

(Testimony of George N. Ireland.)

berries, that I took the one piece of the barrel, put to another to make a full barrel of it, and I found no ice in those barrels at that time.

Q. How general was that condition, Mr. Ireland, as to blowed heads? A. How general?

Q. Yes, how general was it.

A. Do you mean how many?

Q. Yes.

A. Oh, there was quite a few. I must have fixed up, re-headed—re-coopered, I must have re-coopered around fifty barrels, and then I did not get to do the job.

Q. What was the condition of the other barrels you didn't re-cooper?

A. Well, it was soft; that is slushy. [91]

Q. Did you see any barrels with holes having been punched in the top of the heads?

A. I did.

Q. How many?

A. Quite a number; I didn't count them, but quite a number of barrels that was punched.

Q. Would you say there were any barrels there at all that had not been punched with nail holes?

A. I could not say whether there wasn't barrels in the house that had not—

Q. Could you see any?

A. I don't think I looked at any barrels that had not.

Q. Those that had nail holes in the head, was there anything coming out of the holes?

A. They had been—they were all covered, and

(Testimony of George N. Ireland.)

some of the heads and chines, there was juice coming out and standing on the top.

Q. Were any of those barrels bubbling through the nail holes when you were there?

A. I don't get exactly what you mean.

Q. I say, was any juice bubbling through the nail holes when you were there?

A. To be sure there was. Once in awhile you would see a bubble come out, but the main pressure had gone out of those barrels at that time through those holes and breaks.

Mr. SPENCER.—You may cross-examine.

Whereupon proceedings herein adjourned to Tuesday, June 13, 1922, at 10:00 o'clock A. M. [92]

Portland, Oregon, Tuesday, June 13, 1922.
10:00 A. M.

GEORGE N. IRELAND, resumes the stand.

Direct Examination (Continued).

(Questions by Mr. SPENCER.)

Were those barrels numbered?

A. Yes, sir.

Q. They were numbered from one, two, and so on, up, consecutively? A. Yes, sir.

Q. What kind of number was that? Where was it placed on the barrel?

A. It was placed on the head of the barrel. For instance, it began with number so and so, and gross and net and tare, and so on.

Mr. SPENCER.—You may cross-examine.

(Testimony of George N. Ireland.)

Cross-examination.

(Questions by Mr. BOOTHE.)

Mr. Ireland, your business is that of cooper, is it?

A. How is that?

Q. You are a cooper, are you? Is that your trade? A. I was?

Q. Yes.

A. No. I do some little coopering, but we had a man for that purpose.

Q. Were you present there during the time they were putting these berries in the barrels?

A. Was I there at the time?

Q. Yes. A. Yes, sir.

Q. How did they put them into the barrels?

A. Put them into the barrels through a hole in the table. With the barrels set under the table supposed to save waste or anything. If anything fell it fell on the table. The hole was a little bit smaller than the barrel.

Q. Did they mash them down with anything?

A. We leveled them down with a small level. [93]

Q. What did you have to do that with?

A. Well, I had a hole bored in a board, say, for instance, six inches in diameter, with a broom handle, to level them down.

Q. Did you hammer them down in making them go in?

A. Only leveled them smooth, so that way they would be smooth in the barrel.

(Testimony of George N. Ireland.)

Q. You hadn't any board for that purpose, did you? A. How is that?

Q. You hadn't any board just for the purpose of leveling them up?

A. We did simply because in putting berries in a barrel, this barrel set close up under the table, if you hadn't they would be heaped up in the middle, if you roll the barrel out the berries would go out on the floor.

Q. Were they canning berries as well as putting them into barrels? A. How is that?

Q. Were they canning berries there as well as putting them into barrels?

A. Not in that building.

Q. They had two buildings, did they?

A. Yes, sir, Mr. Kurtz did the canning; I had nothing to do with that.

Q. They were close together, were they not?

A. Oh, there was a railroad track between—alley between.

Q. Did the same trucks which brought the berries to your plant deliver berries to the canning plant? A. I am awfully hard of hearing.

Q. Did the same trucks that brought the berries to your plant take the berries to the canning plant as well?

A. Well, there was some of the berries brought through to my plant and taken—while they wasn't our berries, unloaded directly over at the other platform.

(Testimony of George N. Ireland.)

Q. Do you know whether it is a fact that they put the best berries into the cans and the others into the barrels? [94]

A. As far as that is concerned, I wasn't in the canning room but very little, Mr. Boothe: I don't know much about the canning proposition. My job was barreling.

Q. Were any of those barrels that you put those berries in filled with nail holes before you started them? A. They wasn't.

Q. Were none of them?

A. They wasn't, sir. I have no authority to do anything like that.

Q. Do you know whether or not there were any cans blew up in that canning plant next to you?

A. The canned berries?

Q. Yes.

A. There is a certain per cent of all canned fruit I think blows up; yes, sir.

Q. What.

A. I think there is a certain per cent of all canned fruit they waste, yes, by explosion.

Q. Do you know what percentage that was?

A. No, sir.

Mr. BOOTHE.—That is all.

Redirect Examination.

Q. Mr. Ireland, on this question of nail holes, I understood you to say that—you may correct me if I am incorrect on that—that you laid the barrels down and rolled them there after they were packed to see if everything was all right?

(Testimony of George N. Ireland.)

A. Every barrel was tested before it left the house, laid down and rolled, to see that there was no leakage; if so it was corrected before it left the house.

Q. This question of canned goods, did I understand you to say that there is a certain percentage of loss in canned goods?

A. That is what the canneries tells me, that they figure on a certain [95] percentage of canned goods, certain percentage of loss on it.

Q. This canning plant, was that in the same building as Mr. Baker's packing plant?

A. It was not.

Q. And it was—how far away, where was it?

A. Well, there was an alley, railroad track between the two buildings.

Q. And who was operating that canning plant there during that season of 1920?

A. It was operated under Mr. Kurtz.

Q. Kurtz? A. Yes.

Q. And do you know where Kurtz got his berries? A. No, I do not know.

Q. Was he a buyer of berries from the growers?

A. He handled some berries, yes, sir, I think.

Q. And do you know how he got his berries in from the growers? A. How?

Q. Do you know how Kurtz got his berries in from the growers?

A. Well, indeed, I don't. Of course he had a truck of his own but whether he delivered his own

(Testimony of George N. Ireland.)
berries or had somebody else I don't know about that.

Mr. SPENCER.—That is all.

Witness excused.

Testimony of J. W. McGee, for Plaintiff.

J. W. McGEE, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. McGee?

A. 819 Albina Avenue, Portland.

Q. What is your business? [96]

A. Truck driver.

Q. Were you driving a truck in the months of July and August, 1920? A. Yes, sir.

Q. For whom?

A. Willamette Valley Transfer.

Q. Did you have anything to do with hauling barrels of loganberries for Mr. Baker from Salem to Portland? A. Yes, sir.

Q. Where did you deliver those berries in Portland?

A. Over across the river here at the cold-storage plant.

Q. Is that the National Cold Storage and Ice Company?

A. That is the National Cold Storage and Ice Company.

Q. That is the one that is operated by the Reids?

(Testimony of J. W. McGee.)

A. Yes, sir.

Q. What kind of a vehicle did you have?

A. I had a two-ton G. M. C.

Q. That was the truck? A. Yes, sir.

Q. How was the truck equipped, as to covering?

A. Had canvas sides, top on it.

Q. And were you familiar with the other trucks that the other boys operated? A. Yes, sir.

Q. How were they built as to covering, sides and top?

A. Two or three of them had sheet iron sides and canvas tops. Two more besides mine that had the canvas sides.

Q. Who were the other drivers of the trucks that summer? A. Bailey and Bauer and Hicks.

Q. Did you take barrels of loganberries from the Baker packing plant at Salem?

A. Yes, sir. [97]

Q. Now, about how many trips a day would you make with those barrels of berries?

A. I would only make one.

Q. And when, ordinarily, would you make that trip, day or night?

A. Generally left Salem about six o'clock.

Q. In the evening? A. Yes, sir.

Q. And will you state about what your average time that summer was in operating that truck from Salem to the cold-storage plant?

A. About three and a half or four hours.

Q. Was there any limitations on speed that year?

A. No, sir.

(Testimony of J. W. McGee.)

Q. How many barrels, ordinarily, would you take on your truck coming down?

A. Well, it would vary; some times we got three or four, other times we got fourteen one load.

Q. Sometimes did you operate a trailer with your truck?

A. No, I don't operate no trailer.

Q. You didn't, but did some of the other boys operate a trailer? A. Yes, sir.

Q. And when they had trailers about how many barrels would they haul, with the truck and trailer?

A. Oh, they would run around from twelve to twenty on each vehicle.

Q. Twelve to twenty on each vehicle, or twenty to forty on the two? A. Yes.

Q. Now, what was done that summer, do you know, with respect to keeping the barrels covered up on the trucks; were they in the sun as they came down from Salem, or in the shade, or how?

A. No, they were in the shade.

Q. Did you have anything over the end of the truck? A. A tail curtain. [98]

Q. A what? A. A tail curtain.

Q. And did you see the trailers that the other boys operated? How were they equipped as to having any covering?

A. Well, they had canvas tops on them and canves sides, the same as the trucks did.

Q. Now, when you got down to Portland with the barrels of loganberries, what did you do with them?

A. Took them over here to the cold storage.

(Testimony of J. W. McGee.)

Q. And when you delivered them to the cold storage would you get any kind of a receipt from the cold-storage people?

A. If I could find any of them I would.

Q. What say?

A. If I could find any of them I would get a receipt.

Q. Well, did you generally find somebody around there?

A. Sometimes have to get on top of the ice cars to find them.

Q. But you generally found them there?

A. Yes, sir.

Mr. SPENCER.—I will ask that this package of papers be marked for identification.

(Papers marked Plaintiff's Exhibit 1 for Identification.)

Q. I will hand you, Mr. McGee, a package of papers purporting to be receipts for barrels of loganberries, and ask you to state whether or not you identify those. A. Yes, sir.

Q. What does that package of papers consist of?

A. That is receipts for barrels of berries that we delivered at the ice plant.

Q. Do you recognize those receipts as having been—some of them, at least, having been given to you for barrels of loganberries which you delivered? [99] A. Yes, sir.

Q. Do you identify the signatures on the bottom of the receipts? A. Yes, sir.

(Testimony of J. W. McGee.)

Q. And whose signatures are they?

A. Mr. Horne.

Q. Who is Mr. Horne?

A. That is the night man over there.

Q. For the cold-storage people? A. Yes, sir.

Q. And who else?

A. There is one man I can't make that out.

Q. That is Horne too. Who was Mr. Patton?

A. Mr. Patton was the day man, I think.

Q. And who was Mr. Kennedy?

A. Mr. Kennedy I think was an office man.

Q. I notice some of these receipts signed by William Reid; seems to be William Reid. When those barrels of loganberries were delivered by you to the cold-storage people what, if you know, was the practice on the part of the cold-storage people to note on the receipts the bad condition of any barrel that might be in a bad condition?

A. All the berries that I delivered there were marked on them if there was anything wrong.

Q. And do you know whether that was the practice during that season of 1920 on those deliveries?

A. Well, it was always with mine.

Q. Mr. McGee, what was the condition of the barrels which you hauled down when you made delivery of them to the cold-storage people?

A. It was all in good shape except the ones marked there.

Q. About how many barrels during the season of 1920, as you now recall, did you deliver which were in bad condition?

(Testimony of J. W. McGee.)

A. I think there were four, as well as I remember; two on one load and two on another load. [100]

Q. And you were hauling throughout that entire season, were you? A. Yes, sir.

Q. What, if any, opportunity did you have for inspecting the barrels as they were unloaded?

A. I unloaded them all myself.

Q. And you had opportunity, did you, to see the heads of the barrels? A. Yes, sir.

Q. And the bottoms? A. Yes, sir.

Q. Except for the ones that you have mentioned, you say four that you recall, were those barrels sizzling and bursting the heads out when you made delivery to the Cold Storage Company?

A. No, sir.

Q. Now, what would be done with the barrels after they were taken off of your truck, so far as you know?

A. So far as I know they were left there in the aisle.

Q. What have you observed there as to the prompt taking of the barrels by the cold-storage people and putting them into the refrigerator-room, or the freezing-room?

A. Well, I had pulled in there at times and had to roll the barrels out of the way to get mine in, that had already been delivered.

Q. Do you know how long, for example, barrels had remained there in the aisles after delivery and before they were taken away?

(Testimony of J. W. McGee.)

A. Well, the trucks would generally leave about three hours ahead of me in Salem. How soon he got there—I suppose he made the trip as quick as I did—

Q. Your running time averaged about the same time, did you not? A. Yes, sir.

Q. Well, if you found barrels in there when you got in and the truck at Salem had left about three hours ahead of you and made [101] about the same time you did, how long would you say the barrels had been there from the previous load?

A. About three hours and a half or four hours.

Q. And those barrels had not yet been placed in cold storage by the cold-storage people?

A. No, sir.

Q. What do you mean by the aisle in the cold-storage plant there?

A. Well, it is the entrance that goes between the ice bunkers, I reckon they call it.

Q. Was that in the ice-room, or where there were refrigerator-pipes?

A. No, just an aisle. The truck went between them.

Q. Except for the barrels that you have mentioned—four, I think you said, that were in bad order that you delivered, did you observe any fermentation of barrels that you delivered there?

A. No.

Mr. SPENCER.—Cross-examine.

(Testimony of J. W. McGee.)

Cross-examination.

(Questions by Mr. BOOTHE.)

Do you know, Mr. McGee, what the distance is from Salem to the cold-storage plant where you hauled these goods?

A. About fifty-two miles.

Q. You have stated that your truck is one covered with canvas. What kind of wheels do you have?

A. What kind of what?

Q. What kind of wheels on the truck; what kind of tires? A. Solid tires.

Q. Solid tires? A. Yes, sir.

Q. How much of that road was unpaved at that time—what portions?

A. Why there was about four miles.

Q. From where to where? [102]

A. Era to Canby.

Q. Wasn't there considerable space in 1920 beyond Era that was not paved yet at that time?

A. No.

Q. When you unloaded your goods you always found somebody there to receive them, did you?

A. Sometimes I could find them, sometimes could not without running around over the plant.

Q. There was a night watchman there, was there not? A. Yes, sir.

Q. Well, you succeeded in finding someone? Although you came at night you found someone there to take the goods in, did you? A. Yes, sir.

Q. As soon as you unloaded your goods did you go right away?

(Testimony of J. W. McGee.)

A. I don't just understand you.

Q. Well, I will put that question in another way: Did you remain about the plant there for a while after you unloaded your goods, or did you go away after you got them unloaded?

A. No, I left immediately after I got my signature on them.

Q. This bundle of papers that you presented here represent all the goods that you hauled individually? A. No. No.

Mr. SPENCER.—They represent all of them.

Q. Oh, this represents what you hauled, as well as what the other drivers hauled? A. Yes, sir.

Q. All that these receipts pretended to show was the fact that the Willamette Valley Transfer Company, yourself and the other drivers, had delivered so many of these barrels at that warehouse?

A. Yes, sir. [103]

Q. Did any of those barrels have nail holes driven in them before you left them at the warehouse?

A. No, sir.

Q. I believe you stated that they didn't any of them ferment on the road while you were *bring* them in?

A. Not outside of the ones that were marked that way.

Q. These were— A. Four, I think.

Q. —four.

A. I think I had four that year; either three or four.

(Testimony of J. W. McGee.)

Q. And what was done with them when they came into the warehouse?

A. Well, they just taken them into the warehouse and marked them "Bad order" on the bill.

Witness excused.

Testimony of R. Bailey, for Plaintiff.

R. BAILEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Bailey, where do you live?

A. 280 Beech Street.

Q. Here in this city? A. Yes, sir.

Q. And what is your business?

A. Truck driver.

Q. Were you employed as a truck driver in the loganberry season of July and August, 1920?

A. Yes, sir.

Q. And did you haul—drive a truck for the Willamette Valley Transfer Company from Salem to Portland that year? A. I did.

Q. Did you haul barrels of loganberries for H. A. Baker from his [104] packing plant in Salem to the cold-storage plant at Portland? A. Yes, sir.

Q. What kind of a truck did you operate?

A. Operated a Fageo.

Q. And how was that truck equipped as to being covered? A. Iron sides.

Q. What was over the top?

(Testimony of R. Bailey.)

A. Canvas.

Q. Did you operate a trailer at any time with your truck? A. Yes, sir.

Q. How was the trailer equipped as to being covered?

A. The trailer had canvas top and canvas sides.

Q. And when you loaded the barrels of loganberries on your truck, will you state whether or not the barrels were covered so that if they were hauled in the day when the sun was shining they were in the shade? A. They was.

Q. When did you usually make those trips with the trucks? A. In the evening.

Q. And during that season of 1920 about what was your average time between Salem and the cold-storage plant at Portland?

A. Between three and a half and four hours.

Q. Did you always haul the same number of barrels? A. Not always; no, sir.

Q. Well, how did you—what determined the number of barrels that you should take?

A. Why, as many as we could haul, or as many as they had there at the time we left.

Q. And how many trips a day would you make?

A. One.

Q. One trip. There was no speed limit against you that year? A. No, sir. [105]

Q. Now, when you got down to Portland you made deliveries to the cold-storage plant, did you, of these barrels? A. I did.

(Testimony of R. Bailey.)

Q. And what was done when you made deliveries of the barrels? A. Just what do you mean?

Q. Well, did you get any receipt for them?

A. Yes, sir.

Q. I will hand you Plaintiff's Exhibit 1 for Identification, and ask you to state whether or not you identify that package of papers—part of them, at least, as covering barrels that you delivered?

A. Yes, sir; I do.

Q. And state whether or not it was the practice during the entire season of 1920, when you would deliver barrels, for you to take up a receipt of that kind?

A. Why, we had a receipt like this when we delivered barrels in there; we had them O. K. them that way after they were marked.

Q. And the receipt showed the number of barrels, did it? A. Yes, sir.

Q. And the date? A. Yes, sir.

Q. And who gave you the receipts from the cold-storage plant?

A. This Mr. Horne, I think, here.

Q. Well, whoever was in charge there?

A. Yes, whoever was in charge there when we delivered the berries.

Q. What was the practice during that season, so far as you were concerned, as to their noting on the receipts any bad order barrels?

A. They signed for all poor order barrels we delivered there.

(Testimony of R. Bailey.)

Q. Did you have any bad order barrels there yourself?

A. I think it was three that I delivered there in bad order.

Q. And what, Mr. Bailey, have you to say as to whether or not the barrels you delivered there in that season of 1920 were sizzling [106] and bursting and fermenting and juice running out of the top, except for the three you have mentioned.

A. There was none of the others at all.

Q. Who unloaded the barrels from the trucks?

A. I did myself.

Q. And did you have the opportunity to see the tops of the barrels? A. I did, you bet.

Q. You think that you would have discovered any such condition if they had been bubbling and sizzling and bursting? A. I think I would.

Q. Did you ever go there with a truckload of barrels, or a load of barrels and find that there were still barrels in that aisle that had not been placed on the ice or in the ice room?

A. Yes, sir.

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

What kind of truck do you drive, Mr. Bailey?

A. Fageol.

Q. What kind of wheels, solid tires?

A. Yes, sir.

Q. You made an average of about three miles

(Testimony of R. Bailey.)

and a half an hour—you would make an average of fifteen miles and a half from Salem to Portland?

A. An hour, yes. If they had given me a chance I would make it in twenty-five.

Q. Would those trucks go twenty-five miles an hour? A. Yes, they would go forty.

Q. What was the reason for that speed?

A. Get them here in a hurry.

Q. You were told to?

A. Not exactly. We were told to get them here as quick as we could. [107]

Q. You went over some rough ground?

A. Yes, and I went over pavement.

Q. You went over rough ground? A. Yes.

Q. How fast would you go over that?

A. Just as fast as we could without hurting ourselves—without hurting the truck.

Q. Those berries got a pretty good churning before they got up here, didn't they?

A. Well, not to speak of.

Q. How many other trucks were there besides yours?

A. I think there were four—three or four.

Q. Sometimes some of the other fellows came in ahead of you, did they? A. Yes, sir.

Q. And when they would unload, drive out of the way, you would come in and unload and drive out of the way?

A. There was never nobody ahead of me when I got there.

(Testimony of R. Bailey.)

Q. They were all started along somewhere about the same time?

A. All along between six and seven.

Q. Six and seven o'clock?

A. Yes, and eight.

Q. And those who went ahead of you naturally unloaded before you? A. Yes.

Q. And they unloaded all at the same place, did they? A. They did.

Q. Put them in the aisle there? A. Yes.

Q. So those that got in ahead there had some barrels in the aisle before you got them put in the storage?

A. There was plenty of time for them to get the barrels in the storeroom before any of the other drivers got there, if they had done that.

Q. How do you know?

A. Because there was plenty of time between times. It doesn't take [108] two or three hours.

Q. You say all started in an hour of each other?

A. I say an hour or two hours; there was very seldom over two of us.

Q. Then the barrels could not have laid in the aisle over two hours after they got there until you got there?

A. Yes, two to three. There might have been a difference in our running time from Salem?

Q. Explain to the jury, now, if these people started an hour ahead of you, and you all traveled about the same rate of speed—

(Testimony of R. Bailey.)

A. No, not all.

Q. Explain to the jury how it is that those berries could be in the aisle some two or three hours before you got there?

A. Well, there was a man, I might start ahead of one of the other fellows and make it quicker than he did; I might make three hours and he in four.

Q. Did you ever pass any of the other boys on the road? A. No, sir.

Q. Did any of them ever pass you?

A. No, sir.

Q. Did you notice any nail holes driven in any of the barrels? A. There was none.

Q. Did you drive any of them yourself in them?

A. I did not.

Q. Were you instructed to drive nail holes in the barrels if they were in distress?

A. No, sir.

Q. Did you hear any of them sizzling or fermenting?

A. No, but what they signed for over there in bad order.

Mr. BOOTHE.—That is all.

Witness excused. [109]

Testimony of George Bauer, for Plaintiff.

GEORGE BAUER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, George?

A. 870 Mallory Avenue, city.

Q. And what were you doing in the months of July and August, 1920?

A. Driving truck of the Willamette Valley Transfer.

Q. Did you haul loganberry barrels for Mr. Baker from Salem to the cold-storage plant here?

A. Yes, sir.

Q. What kind of a truck did you drive?

A. Fageol.

Q. How big a truck is that?

A. Three and a half tons.

Q. Did you sometimes have a trailer?

A. Yes, sir.

Q. And how were your truck and trailer equipped as to covering?

A. Sheet iron sides and canvas top and canvas tail piece.

Q. When would you generally make the trips from Salem to town?

A. Most of the times in the evening.

Q. About what was your running time that summer of 1920 between Salem and Portland for those?

(Testimony of George Bauer.)

A. Between three and a half and four hours.

Q. Did you maintain a fairly regular schedule of time? A. Yes, sir.

Q. The Willamette Valley Transfer Company, what is that? Does it do a general trucking business?

A. That is our regular business, freighting business between Portland and Salem—freight service.

Q. Now, did you get receipts for barrels when you brought them to the cold-storage plant at Salem? [110] A. Yes, sir.

Q. And I will ask you to have a look at Plaintiff's Exhibit for Identification 1 and state whether or not the receipts that you got were of that type and whether or not you recognize those receipts —part of them, which you were given in that season? A. Yes, sir, these are some of the receipts.

Q. And what was the practice, so far as you were concerned, with respect to noting on the receipt the bad order, condition of barrels, whenever they were received?

A. Whenever there was any barrels in bad order used to mark it on the receipt, the one that he signed, so many barrels in bad order.

Q. Do you remember now whether you had any bad order barrels, and, if so, how many?

A. I think I had one bad order barrel that season.

Q. Did you have occasion to see the tops of the barrels when you unloaded them? A. Yes, sir.

Q. Were they sizzling or fermenting?

(Testimony of George Bauer.)

A. I never had one—yes, I did, I had one barrel that was fermenting, and just the one.

Q. That is the one you have mentioned?

A. Yes, sir.

Q. So far as you observed were the barrels in the same—except for the one—general condition when you got them down here as they were when you left Salem? A. Yes, sir.

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

You understand about fifty-two miles you hauled the berries? [111] A. Yes, sir.

Q. What do you remember as to the number of miles that were not paved at that time?

A. Why there was four miles that was not paved.

Q. Four miles. How many barrels did you say came to the plant that you hauled that were fermenting? A. I had one bad order barrel.

Q. One? A. One bad order barrel.

Q. Do you know whether or not one of those trucks ran off into a ditch at some time while you were hauling there and was in the ditch about thirty-six hours? A. Not that season.

Q. Not that season? A. Not that season.

Q. When was it?

A. I don't think that has anything to do with this case at all.

Q. You say there were none of them in the ditch this season? A. There was not.

(Testimony of George Bauer.)

Q. Can you remember how many loads you hauled? A. I do not.

Q. You always found somebody there to receive the berries, did you?

A. We always had to look for somebody, yes.

Q. You expected to do that, didn't you, coming in at night? A. I don't think so.

Q. You don't expect to find a man standing right there from ten to eleven o'clock at night, looking for you, do you?

A. There was supposed to be a man there that night to receive the berries when they came in.

Q. Well, he did do it, he received them?

A. Yes, sir.

Q. And you unloaded them and he took charge of them? [112] A. Yes, sir.

Q. You unloaded and went right away, did you?

A. Yes.

Q. You don't know whether he left them there all night in the aisle, or not, do you?

A. That made no difference to me, as soon as he signed for them.

Q. Whenever he signed for them you got out of the way? A. Sure.

Redirect Examination.

Q. This truck counsel asked you about, do you know when that truck did go off the grade?

A. That was the summer before that.

Q. Summer of 1918? A. Yes.

Q. Do you know whose truck that was?

A. Willamette Valley.

(Testimony of George Bauer.)

Q. Was there any truck went over the grade in 1920? A. No, sir.

Recross-examination.

Q. Those barrels were numbered, were they?

A. Yes, sir.

Q. In consecutive order, I understood the cooper to say, or Mr. Ireland to say—they were numbered from one on up? A. They were.

Q. That is right, is it? A. Yes, sir.

Q. You didn't pay much attention to that number? A. I didn't pay any attention.

Q. But you know they were all numbered in that manner? A. Yes, sir.

JUROR.—I would like to ask a question: What caused that barrel to ferment? [113]

A. What caused that barrel to ferment?

JUROR.—Yes.

A. I don't know anything about that. All I was interested in was the hauling of it. I didn't pay any attention to the fermenting of it.

Mr. SPENCER.—You are not a berryman?

A. I am not a berryman. I am a truck driver.

JUROR.—I would like to ask one question: The size of those barrels.

A. The size of them? They stand about three feet high and they are a foot and a half wide, I think; they are fifty gallon barrels.

Witness excused.

Testimony of L. Hicks, for Plaintiff.

L. HICKS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Hicks, what is your business?

A. Truck driver.

Q. And were you employed as a truck driver in the summer of 1920? A. Yes, sir.

Q. Hauling barrels from Salem to Portland?

A. Yes, sir.

Q. Barrels of the kind we have been talking about here? A. Yes, sir.

Q. And were your trucks equipped about the same way with the other boys?

A. Mine had canvas sides and canvas top.

Q. Did you have a trailer? A. Yes, sir.

Q. What sort of time did you make in that season of 1920? [114]

A. Three hours and a half to four hours.

Q. You drive a truck now, do you? A. Yes.

Q. Do you drive on that road now?

A. Yes, sir.

Q. Now, when you got down here to the cold-storage plant did you get receipts for the deliveries that you made? A. Yes, sir.

Q. And will you state whether or not you identify Plaintiff's Exhibit 1 for Identification as including the receipts which came to you?

A. Yes, sir.

(Testimony of L. Hicks.)

Q. What, Mr. Hicks, have you to say as to the practice there at the time of noting on the receipts bad order barrels when they were received?

A. They wrote "Bad order" on the receipt.

Q. Do you remember whether or not you had bad order barrels?

A. No, sir, I did not, not that year I didn't.

Q. Did you observe any barrels that you delivered there spewing and sizzling or fermenting?

A. No, sir.

Q. Heads blowing out? A. No, sir.

Q. Did you notice any nail holes in any barrels?

A. There was no nail holes.

Q. While they were in your possession.

A. If there was nail holes they drove them after I was gone.

Q. I mean any there while you had charge of them? A. No, sir.

Q. You got these barrels of berries, as I understand you, Mr. Hicks, from the packing plant of Mr. Baker at Salem? A. Yes, sir.

Mr. SPENCER.—You may cross-examine.

Cross-examination. [115]

(Questions by Mr. BOOTHE.)

Did you notice whether or not the barrels were numbered? A. They are all numbered.

Q. Consecutively, as the other witness testified?

A. Yes, sir; the weights and number of the barrel and the—

Q. About what time did you start from Salem?

(Testimony of L. Hicks.)

A. I left all the way from six to nine o'clock at night, and some nights were later than that. All depends on how late they worked.

Q. Did you ever pass any of the other drivers?

A. No, sir.

Q. Did any of the other drivers pass you?

A. No, sir.

Q. Did you know of any of them ever passing another? A. No, sir.

Q. Your tires were hard rubber tires?

A. Solid tires.

Q. Solid tires. That is all.

Witness excused.

Mr. SPENCER.—If your Honor please, I will offer in evidence the receipts marked Plaintiff's Exhibit 1 for Identification.

Mr. BOOTHE.—No objection.

(Receipts received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. SPENCER.—I suppose it may be understood that reference may be made to the receipts at the time of the argument without reading them?

COURT.—Yes.

Testimony of N. H. Kelly, for Plaintiff.

N. H. KELLY, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows: [116]

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Kelly?

(Testimony of N. H. Kelly.)

A. I live in Sumner, Washington, at present.

Q. Are you employed by Mr. H. A. Baker?

A. I am.

Q. In what capacity? A. As bookkeeper.

Q. Have charge of his office there?

A. Yes, sir.

Q. Were you there in that capacity and in charge of the office of Mr. Baker in the summer of 1920?

A. I was.

Q. During the months of July and August?

A. Yes.

Q. You may state, Mr. Kelly, whether or not, during that loganberry season of July and August, 1920, whether you received in due course of mail, beginning along the first of July and continuing to the end of the loganberry season, receipts for loganberries stored by Mr. Baker with the National Cold Storage and Ice Company at Portland—loganberries coming from the packing plant at Salem, Oregon; warehouse receipts? A. Yes, sir, I did.

Q. I hand you a package of receipts marked Plaintiff's Exhibit 2 for Identification, and ask you to state whether or not you recognize those papers as the receipts which came to you by mail day by day during that loganberry season of 1920?

A. Yes, sir; these were mailed to our office.

Q. And when you got them you took them and placed them on file? A. Yes, sir.

Q. And kept them?

A. I filed them as they came. [117]

(Testimony of N. H. Kelly.)

Q. And state whether or not those receipts purport to cover the entire quantity of barrels of loganberries stored by Mr. Baker with the cold-storage people during that season of July and August.

A. Yes, these are supposed to cover the berries.

Q. At any rate you received those from the cold-storage people by mail?

A. Yes, these came through the mail to our office.

Q. And are they in the same form now as when received by you? A. Yes, sir; they are.

Mr. SPENCER.—I will offer those in evidence.

(Receipts received in evidence and marked Plaintiff's Exhibit 2.)

Mr. SPENCER.—I would like to read one of them to the jury as we go along. For example, I will—the first one covers two barrels of strawberries and three barrels of loganberries. I will read the second one, which is just loganberries. Headed National Cold Storage & Ice Co. Duplicate. 309 East Washington Street. There is a number. 7–7–20. That is July 7, 1920. Received of H. A. Baker 1 bbl. Loganberries. Lot Number 8824. Signed by Joe somebody down there; I can't make that out. Some are signed Patton and some with somebody else. On the back of the receipt is stamped this language: "The National Cold Storage & Ice Company shall be liable for any loss thereof or damage thereto of any property in its possession herein described except as hereinafter provided. The National Cold Storage & Ice Company shall not be liable for any loss thereof or damage thereto

(Testimony of N. H. Kelly.)

caused by the act of God, fire, rats or other animals, insects or the elements, same to be removed to or from fire or flood at owner's risk and expense or for differences in weights of commodities caused by natural shrinkage or discrepancies in warehouse weights or count. Claims for loss or damage must be made in writing to the National Cold Storage & Ice Company within forty-eight hours after delivery of the property. Unless claims are so made the National Cold Storage & Ice Company shall [118] not be liable. The National Cold Storage & Ice Company shall have the full benefit of any insurance that may have been effected upon said property caused by loss or damage." And that same thing is stamped on every receipt in the package. You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Did you have an office in Tacoma at the time you received these goods? A. Yes, sir.

Q. What was the number of your office there—Baker's office? A. It was 322 Tacoma Building.

Q. What was it?

A. It was in the Tacoma Building; I think the number was 322.

Q. Who sent those receipts to you?

A. Why, they came from the Cold Storage Company, National Ice and Cold Storage Company.

Q. From the defendant. Were you in the employ of Mr. Baker during the whole season of 1920, summer of 1920, we will say? A. Yes, sir, I was.

(Testimony of N. H. Kelly.)

Q. How long were you in his employ after that?

A. Up until the present time.

Q. You still keep your office at that same place?

A. No, we now have them at Sumner.

Q. How long did you occupy your office at that building, 322 Tacoma Building?

A. Why, it was along in October of 1920, when we left them.

Q. Any mail that was sent to that office after that time was forwarded to you, was it, to Sumner?

A. Yes, sir.

Q. The defendants not only sent those receipts to you, but they sent statements of storage to you, too, did they? [119]

A. They did up until about the time that they stopped sending statements; in other words, up until about the time or shortly after the time that all the barrels were in storage.

Q. After the time of what?

A. That all of them had been put in storage; in other words, they ceased sending statements after that.

Q. Sent statements of the amount due for each month's storage, is that it?

A. Why, they sent along invoices covering storage on the different lots as they had taken them in there and at the end of the month made a regular statement showing the invoices thereon and the amounts.

Q. They sent them right along each month?

(Testimony of N. H. Kelly.)

A. Up until October or November of that year and thereafter I didn't receive any.

Q. Of that year, you say? A. Yes, sir.

Q. Didn't they send them on up until September, 1921? A. I didn't receive them if they did.

Q. Did you answer any of those you did receive?

A. Sir?

Q. Did you answer any of those that you did receive?

A. Well, there wasn't any answer required; we simply ignored them.

Q. Did you pay for them or remit the amount due?

A. Why, the balance ran along there, I don't recall whether we made any remittances on account or not. We were in the habit of making remittances in covering any of our bills.

Q. Are you in the employ of Mr. Baker at the present time? A. I am.

Mr. BOOTHE.—I think that is all.

Witness excused.

Testimony of J. L. Van Doran, for Plaintiff.

J. L. VAN DORAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows: [120]

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Van Doran, where do you live?

A. Salem, Oregon.

Q. And how long have you lived there?

(Testimony of J. L. Van Doran.)

A. Six years.

Q. What connection do you have with Mr. Baker's packing plant and loganberry business there?

A. Why, I was in charge of it.

Q. And was that true in the season of 1920?

A. Yes, sir.

Q. What did your duties consist of there, Mr. Van Doran? A. Managing the plant.

Q. How much experience have you had with reference to the loganberry business?

A. Why, I have been packing there at Salem for five or six years and before that I packed berries in California.

Q. Mr. Baker has been in the business of packing loganberries and fruits in the Willamette Valley for how long?

A. Why, about five or six years in the Willamette Valley.

Q. And when I say packing fruits—when you say packing fruits, do you mean packing in barrels in the same general way that has been described here?

A. Yes, sir.

Q. As going on in the season of 1920?

A. Yes, sir.

Q. Do you know how long that business has been a substantial business, generally, of packing berries in barrels generally, in the way described here?

A. Why, I would say—I think Mr. Baker was packing berries in barrels that way since 1910 or '11. [121]

(Testimony of J. L. Van Doran.)

Q. You have known of him having done that since that time? A. Yes, sir.

Q. Now, this loganberry season of 1920 began, as I understood it, about July, picking of the berries began along about the first of July? A. Yes, sir.

Q. And your work about the plant at Salem, what did that bring you in contact with? Did you have occasion to see the work going on in the yards?

A. Yes, sir.

Q. How often would you be out among the yards?

A. Why, probably every few days I would run out to see how they were getting along, see the condition of the berries.

Q. And what have you to say as to the time consumed in getting the berries in from the growers into the packing plant—from the growers' yards? Was it two or three days or the same day? What time was consumed?

A. It was the same day, and generally very shortly after they were picked; probably a few hours.

Q. Who provided the service there?

A. Mr. Baker.

Q. And what was the reason for Mr. Baker providing his own truck service gathering up the berries from the growers?

A. To get them in fresh and firm and put up a good pack of fruit.

Q. Was there any particular demand for loganberries that year?

A. A very great demand for them.

(Testimony of J. L. Van Doran.)

Q. Now, when the berries came into the packing plant, do you have occasion to observe their condition? A. Yes, sir.

Q. And what would you say as to the condition of the berries that year, as to whether they were firm or overripe, or what?

A. Why, they were some of the best berries that I have ever seen; they were firm, good, solid berries.

Q. Was there any condition of decay or fermentation or moulding or [122] anything that would tend, as far as you were concerned, to deteriorate the berries? A. No, sir.

Q. Are you quite familiar with the canning that was done by Mr. Kurtz up there? A. Yes, sir.

Q. In a plant near by? A. Yes, sir.

Q. Just what work was done by him there in the way of canning?

A. Why, he was canning fruits, loganberries and different other fruits there during the—well, practically all of the season.

Q. Do you know where he got his berries, a large part of them? A. Yes, sir.

Q. Where?

A. At and around and about Salem.

Q. How did he get them into his plant?

A. Growers brought them in.

Q. He didn't afford the same service in gathering them up as you did? A. No, sir.

Q. And in canning the berries there what was the fact as to whether or not in operating his can-

(Testimony of J. L. Van Doran.)

ning plant he could keep up with the incoming berries? A. Why, he—just how do you mean?

Q. There has been some testimony here, some talk here about some canning of berries in Kurtz's factory that blew up and fermented; I am asking you whether or not you observed whether or not Kurtz kept up with the canning of the berries.

Mr. BOOTHE.—If the Court please, I am not asking about anything of Kurtz. What I was asking about, was what Mr. Baker was doing there, if he was canning goods. I don't care anything about Kurtz and I object to any testimony about his business. All I want to know is what Mr. Baker was doing there.

Mr. SPENCER.—I submit, your Honor, as a matter of fact counsel [123] has confused the Kurtz berries with the Baker berries, and I simply want to show that Kurtz was canning near by and if he had fermenting berries it wasn't any fault of Baker.

COURT.—He may answer.

A. He was sometimes back in arrears of the amount of fruit that was coming in, but I think probably the cause of the trouble he had with his cans was due to the fact that he had an inexperienced canner; then, to start with, a very antiquated machinery and also that they got confused in the tops of the cans that were put in. That is where the trouble came from there.

Q. Now, Mr. Van Doran, something has been *same* here about whether or not ice was added, ice

(Testimony of J. L. Van Doran.)

was put into the barrels of loganberries handled by you in 1920, the Baker barrels. What is the fact about that?

A. There was no ice put into the barrels.

Q. Had ice ever been put into the barrels?

A. Several years ago we put ice into the barrels. That was in order to meet competition with the other people that packed fruit in barrels. They could buy ice at a much lower price.

Q. You have got to talk loud.

A. We put ice into the barrels in previous years.

Q. By "previous years" what years do you mean?

A. Before 1919. 1918 put ice into the barrels, but not after that.

Q. What was the reason for putting the ice in the barrels?

A. The reason that the ice was put into the barrels was because it could be bought for about five dollars a ton, where we were paying a great deal more than that for the berries, and our competitors started putting ice, chipped ice, into the barrels, and they would sell it all as fruit, see, and they would be paying a great deal less for the ice. Then the Government came along and said, "If you are going to put ice in the barrels you will have to label it as such, in order [124] that the purchasers of this stuff are not paying for three or four—whatever times it was—as much for the ice as they do for the berries"; and as a matter of fact, now,—I mean by experience, the ice is superfluous in so far

(Testimony of J. L. Van Doran.)

as preserving the berries, so we discontinued it in 1918.

Q. 1918? A. That was the last year.

Q. That was the last year you used it?

A. Yes, sir.

Q. And you haven't used ices in barrels since?

A. No, sir.

Q. Do you know what the fact is as to the general condition of the trade, other packers; do they use ice in barrels now? A. No, sir.

Q. Now, Mr. Van Doran, you have had some experience, have you, in handling berries from the field into the packing plant? A. Yes, sir.

Q. In addition to this experience in 1920.

A. Yes, sir.

Q. What would be the average time from the picking of the berries until they got into the packing plants and went into the barrels?

A. Why, the average time I would say would not exceed four or five hours. It would not—in no case would it exceed over twelve hours.

Q. And then what is the fact as to whether or not the barrels were gathered up and brought to Portland as soon as they were available?

A. Yes, the barrels were brought to Portland as son as they were packed; immediately.

Q. What would you say was the average time from the moment the berries were picked until they got into the cold-storage plant or were delivered to the cold-storage plant at Portland?

A. I don't think the average time would average

(Testimony of J. L. Van Doran.)

twenty-four hours; I would say it didn't exceed twenty-four hours.

Q. Have you had any experience in handling loganberries or similar [125] fruits that are subject to the same natural causes—experience of handling fruits for a greater length of time than twenty-four hours? A. Yes, sir.

Q. What experience have you had in that respect?

A. In 1917 I packed fruit in Lincoln County, at Toledo, Oregon, and railroad facilities there were very poor and lots of time I would pack fruit that probably two days would elapse.

JUROR.—Speak louder.

A. In 1917 we packed berries in Toledo, Oregon, which is over on the coast and the railroad facilities were very poor over there and these berries, blackberries, were raised by homesteaders and people away out in the country out there, the timber, and they were very long delayed in getting them in to us down there, probably a day or possibly two days and from there they were packed and shipped way to Portland by train from there, which meant they had to be shipped either to Albany or Corvallis and then transferred and then up to Portland and I had no trouble with those berries. I imagine those were sometimes as much as two or three or four days, probably, old, before they got in there.

Q. Were those berries stored with the Reids, the National Cold-Storage people? A. Yes, sir.

Q. When you began to ship berries, barrels of

(Testimony of J. L. Van Doran.)

berries from the packing plant to Portland, to the cold-storage people, after you began that work in July, when, do you recall, when did you first come down and go over to the cold-storage plant in Portland and have a look at the barrels then in storage?

A. Why I came down—it was a practice of ours to come down before the season started, to arrange for taking care of these barrels, and after the season started I cannot remember any particular date that I was down until the latter part of July; I think it was around the thirtieth or thirty-first of July was the first time that I remember [126] the exact date that I went in there.

Q. And who were you with at that time?

A. Mr. Baker.

Q. Did you go down into the storage-room?

A. Yes, sir.

Q. Where was the storage-room?

A. The storage-room was on the—well, it was in the basement.

Q. Is that the room that has been described as being equipped with overhead pipes? A. Yes, sir.

Q. Do you remember how that room was equipped, from that trip or any subsequent trip, how it was equipped as having thermometers in it? What kind of thermometers did it have?

A. It had two ordinary, cheap tin thermometers that you use around the house; maybe a little larger.

Q. Are you familiar with the kind of thermometers that are generally used in cold-storage

(Testimony of J. L. Van Doran.)

rooms that register the temperature throughout the day? A. Yes, sir.

Q. And how are they equipped, what do they do?

A. They are a sort of an instrument about that large, that has a little arm on it, and that arm has got red ink on it and all during the day it marks, varies back and forth, whatever the temperature happens to be and marks with this ink on a piece of paper and that is taken away and filed, so that it is an absolute record of the exact temperature at all times during the day. That is the general equipment in all of the other cold storages that I know about.

Q. When you were there in the latter part—you say about the thirty-first of July of 1920, with Mr. Baker, did you observe the condition of the barrels in the cold-storage room at that time?

A. Yes, sir. [127]

Q. And how did you find the barrels at that time?

A. The barrels at that time were in good condition.

Q. Were there any sizzling barrels down there in the cold-storage room on the thirty-first of July?

A. No, sir.

Q. Or any that were blowing the heads?

A. No, sir.

Q. Any oozing of juice out of the barrels?

A. No, the barrels were in good condition. There was practically no stain on them; they were all clean and white.

(Testimony of J. L. Van Doran.)

Q. About how many barrels were there there at that time, on the thirty-first of July?

A. Well, I could not say, really; I think there was about probably around nine hundred or a thousand barrels, offhand; of course I am not sure. Quite a lot of them.

Q. And how long were you there on that trip, do you remember?

A. Why, no, I don't remember; a short time; went through the plant.

Q. Now, if you recall, when did you next hear from the cold-storage people about the subject of barrels down there?

A. About the middle of August; about two weeks later, I think.

Q. As I understand it, in the meantime, following the thirty-first of July and on through the first two weeks of August at least the deliveries kept going from your packing plant on down to the cold-storage plant? A. Yes, sir.

Q. And your deliveries of barrels ended what time, from the packing plant?

A. I think about the sixteenth or seventeenth or eighteenth of August.

Q. The last receipt issued to the Willamette Valley Transfer Company covers one barrel on August eighteenth; is that according to your recollection? [128]

A. That is the last, yes, sir.

Q. And you say about the middle, or some time in

(Testimony of J. L. Van Doran.)

August you had further word then from the cold-storage people; what was that?

A. I understood that barrels were in a distressed condition and I went up to inspect them.

Q. When did you go down the next time, then, to look at the barrels?

A. That was about the middle of August, fifteenth or sixteenth, I believe.

Q. And you came to Portland? A. Yes, sir.

Q. Who was with you? A. Why, Mr. Ireland.

Q. That is Mr. Ireland that testified here yesterday and this morning?

A. Yes, sir; and another man I had to help.

Q. What did you find down there, now, on that trip, as to the temperature, first of all, the temperature in the room where the barrels were?

A. I looked at the thermometer when I first went in there, saw that the pipes were unfrosted and that the general condition of the barrels was in a terribly bad shape. I looked at the thermometer, and it registered thirty-six, which of course was too high to preserve that stuff, and then the barrels had blown and the juice and fruit was all over the floors and the heads were bursted in and in a general bad condition all the way through.

Q. And did you notice any nail holes in the barrels themselves? A. Yes, sir.

Q. Now, on this trip in August, on the thirty-first of July, were there any nail holes in the barrels then? A. No, sir.

Q. And how general was this condition of nail

(Testimony of J. L. Van Doran.)

holes when you were there on the sixteenth of August? A. Why, apparently every one. [129]

Q. Had you directed anybody to put nail holes in the barrels? A. No, sir.

Q. How general, now, would you say, was this condition of heads blown and barrels oozing their contents out through the top?

A. Well, I re-coopered fifty-four barrels that day and there was still more than that. It looked like they all were that way.

Q. You were with Mr. Ireland, were you, the sixteenth and seventeenth? A. Yes, sir.

Q. And now what, again, what was the condition of the pipes as to their being frosted when you first went there on the sixteenth?

A. There was no frost on them at all.

Q. And when the room is frozen, or the brine or juice is on the pipes, does that create frosting on the pipes?

A. Yes, sir; and at that time I asked the people in charge of the cold-storage place what was the reason there wasn't—a reason that there was a temperature there and they told me it was very hot and that they had to make ice and they had to switch their juice, as they call it, over into their ice-making machines in order to keep up the ice for icing cars, the commercial end of the ice.

JUROR.—A little louder, please.

A. I say, at that time I asked the people in charge of the cold storage the reason that these pipes were not frosted and we didn't have temperature that

(Testimony of J. L. Van Doran.)

would hold the stuff. They said they had a contract for ice and that they had to take the ammonia or juice, what they call it, over into their ice-making machinery in order to make enough ice to keep up with their contracts and they were loading out ice and loading it into cars at that very time.

Q. Did you notice any appreciable change in the temperature of the room while you were there on those two days?

A. Not those two days; there may have been a little, but it wasn't very much. [130]

Q. Were you down there after that?

A. Yes, sir.

Q. When was the next time?

A. I think it was, if I remember rightly, it was on a Saturday when I left and the first week—I was down Sunday and I stayed down, I was there, I think, every day for three or four or five days until the temperature was on again.

Q. Just as soon as you saw what was the situation down there what did you do with respect to advising Mr. Baker? A. I wired him immediately.

Q. He was then at what place?

A. I wired him at Sumner, Washington,—yes, Sumner, Washington.

Q. And of course you don't know what took place between Mr. Baker and the cold-storage people; that didn't pass through your hands.

A. Mr. Baker wired me to watch it every day until it was right.

Q. You say the next time you were down there

(Testimony of J. L. Van Doran.)

was the week following. Well, did you get any appreciable change in the temperature then, and if so, how soon?

A. Well, probably before I left the temperature was down to about—

Q. Down to what?

A. It was down to twenty-four or twenty-five after I stayed there for a few days.

Q. How long were you there, do you know?

A. I think it was on a Thursday or Friday, the first time I went up there, and then about Wednesday or Thursday, possibly Friday of the next week it was down to about twenty-four or five. I am not sure as to the exact day, but I think that is pretty close to it.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Are you related to Mr. Baker in any way? [131]

A. Yes, sir.

Q. What is the relationship?

A. He is my stepfather.

Q. He is your stepfather? A. Yes, sir.

Q. How much of your time did you devote to the business in Salem while you were looking after it up there? A. I devoted all my time.

Q. Were you around that plant much of the time?

A. Yes, sir.

Q. Was Mr. Baker canning berries there at any of that time?

(Testimony of J. L. Van Doran.)

A. He was—had made arrangements with some other people to can berries there at that time, yes.

Q. That was doing that for him? A. Yes, sir.

Q. It was his berries that were being canned?

A. Yes, sir.

Q. Were those the berries that Kurtz was canning? A. No, sir.

Q. Kurtz was doing some of his own canning and Mr. Baker was doing his own canning, is that right?

A. Yes, sir.

Q. Now, the goods that were sent up to the plant there, some were sent to the cannery and some sent to be barreled, is that right? A. Yes, sir.

Q. Isn't it a fact that the best berries were put in the cans? A. No, sir.

Q. When you visited the plant about the thirty-first of July you say everything was all right?

A. Yes, sir, the barrels looked good at that time.

Q. And on about the sixteenth, when you came in, how many were fermenting? [132]

A. Why, I think they all were, more or less. Some of them were worse than others.

Q. You say you think. Are you sure? I would like you to tell something definite to the jury. Were they or were they not all fermenting?

A. Of course as I came in they were piled on top of one another, you see, and the general appearance was that they were all fermenting and all sizzling and bursted. As I got into this, why, I coopered fifty-four barrels, put new heads in that many; I would say that practically every barrel had a hole

(Testimony of J. L. Van Doran.)

through it and was fermenting and sizzling, bubbling.

Q. You say there was about nine hundred or a thousand barrels in the plant at that time?

A. I said there was about the thirty-first of July, there was about that many.

Q. About how many were there, then, on the sixteenth of August? A. There wasn't that many.

Q. About how many?

A. I don't know, really, I could not say, but there wasn't as many as that.

Q. Now, speaking with reference to these three hundred and ninety-eight barrels that are mentioned in the complaint, how many of those barrels, if you know, were fermenting? A. All of them.

Q. You say they were all fermenting?

A. Yes, sir.

Q. Now, those barrels that you re-coopered were some holdovers, were they not, some that were in distress, had been in bad condition? Were a good many of those holdovers barrels? That is that had been accumulating during the season?

A. Why, I suppose they were.

Q. They had been shipping quite a lot of goods and the bad ones they [133] left back, isn't that true?

A. I wasn't there when some of those shipments went out, but the barrels I fixed there of course the heads were entirely blown out.

Q. Didn't Reid send to you before this to come out there and inspect the carloads of goods that

(Testimony of J. L. Van Doran.)

were going out and didn't you come down and do that?

A. I don't remember of doing it that particular year; I have done that though.

Q. Didn't you at any time during this shipping season of 1920 come down to their plant here and inspect the goods and report that they were all right and ready for shipment?

A. I don't remember particularly of going down at that time, but I do know that if the barrels were in bad condition I would go down and put them in as good condition as I could before they went out. That is what I did at that time. The fifty-four barrels I went down to re-cooper were supposed to be shipped out. That is the reason I went down there and fixed them.

Q. You came down to re-cooper those barrels at the request of the defendants here, did you not?

A. Yes, sir.

Q. They wanted you to put them in good condition so that you could make something out of them?

A. I don't know. They may have been sold. I could not tell you about that part of it.

Q. You knew some of them were put into the warehouse in bad condition, did you not?

A. Yes, I did.

Q. And you knew they had to be fixed, or re-coopered, didn't you?

A. Yes, sir. The ones that had been marked on the receipts was the ones. Of course lots of times a barrel will break, and irrespective of fermentation,

(Testimony of J. L. Van Doran.)

in the way of cooperage and handling them; sometimes a barrel gets jarred or rotten, something like that and [134] they would be leaking irrespective of the fact of fermentation. And lots of times I would have to go down there and repair a barrel that the fruit would be in perfect condition and the barrel would be broken, a head might break or something, in transferring it.

Q. You didn't expect the defendants to re-cooper the barrels, did you, that had breaks?

A. He had sometimes done that, yes.

Q. What is that?

A. I didn't expect him to, but lots of times, previous years, if a barrel would happen to be broken or something like that, he might put a head in for us.

JUROR.—May I ask a question?

A. Yes, sir.

JUROR.—When you went on the thirty-first of July with Mr. Baker to inspect the barrels, were any of the cold-storage people present in the basement?

A. As a general rule the foreman of the plant would take us down there and go in with us.

JUROR.—And do you know what the temperature was at that time?

A. No, I could not tell you, but it apparently was what it ought to have been, pretty nearly so, because the frost was on and everything was in good shape at that time, as I could see.

JUROR.—They said that they transferred am-

(Testimony of J. L. Van Doran.)

monia from one place to another; why did they do that? Was there a shortage of ammonia?

A. They were putting in some new machinery, they told me at the time, they didn't have enough machinery to run their entire business there. They told me that they had to make enough ice to fulfill some other contract, or something like that, and that they didn't have enough machinery to run both places; that is the cold storage and the ice machinery, making the ice, and they told me at the time that they were installing some new machinery which they showed to us, and they [135] said that they would switch it back again as soon as they could, as soon as they got this ice, or something like that.

Witness excused.

Testimony of H. A. Baker, in His Own Behalf.

H. A. BAKER, plaintiff herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Your name is H. A. Baker?

A. H. A. Baker, yes, sir.

Q. Where do you live, Mr. Baker?

A. Sumner, Washington.

Q. What business have you been engaged in in the past years?

A. Why, principally in the barreled berry, fruit

(Testimony of H. A. Baker.)

business, for the last twelve or fourteen years; in fact, I originated the business.

Q. You started that business?

A. I started the barreled business.

Q. And where did you begin that barreled fruit business?

A. That was started, originated with sour cherries in Colorado.

Q. And then the business expanded to take in other fruits?

A. The business became as staple as eggs or wheat or butter or anything else, and I started out over the country.

Q. How much experience have you had in handling barreled loganberries?

A. Why, I think we have handled barreled loganberries since about 1914, I think we started with loganberries.

Q. And did you, prior to the time you started in in the Willamette Valley, in 1914,—was anybody handling the barreled loganberries there at that time? A. No, not to my knowledge.

Q. And just give us some idea of the extent of the barreled loganberry experience that you have had in the Willamette Valley since that time. [136]

A. I started packing loganberries, I think, about 1914, both in Oregon and in California, and in Washington, and we packed a great many thousands of barrels of loganberries. In fact, we packed, probably, the last ten or twelve years, one hundred thousand barrels of strawberries, rasp-

(Testimony of H. A. Baker.)

berries, loganberries and sour cherries, in different parts of the country and sometimes I have been as far as two hundred or three hundred miles from the cold storage plant.

Q. Will you state, Mr. Baker, whether or not the handling of loganberries and the other fruits that you have mentioned in barrels, packing them in barrels after they are picked and then later getting them into cold storage is a recognized method and business in the handling of fruits?

A. Absolutely is one of the big industries of the United States; in fact, that method of packing fruits has made millions of dollars for the northwest.

Q. Where are most of the loganberries of the country grown?

A. Most of the loganberries are grown in the West here, although quite a few are grown in California and Washington.

Q. Now, in the season of 1920, what, if any, opportunity did you have for observing the condition of the loganberry crop around Salem which you were handling? I mean prior to the time of packing?

A. Why, the condition seemed to be rather favorable that year, if I remember correctly; it looked like a very good crop.

Q. Were you at your packing plant at different times during that season? A. I was; yes, sir.

Q. And did you have occasion to examine the berries?

(Testimony of H. A. Baker.)

A. Yes, I always go through and examine things quite closely when I am visiting the different plants.

Q. And what would you say was the condition, from your inspection of the berries during that season that you saw?

A. They seemed to be in very good condition. I have no criticism to make. The boys were all instructed, if there was any poor fruit of [137] any kind, not to pack them. I don't think they had any, because it is our aim at all times to take care of things promptly and save waste and pack economically.

Q. Your packing plant there was not, as I understand it, connected with a canning plant operated by Mr. Kurtz at the time. Will you explain to the jury about this canning proposition and what, if any, berries, you had canned that year at that place?

A. I had a cannery at Sumner, Washington, and at Sumner, Washington we were a little short of loganberries that year; I had taken some orders for canned loganberries, so I made arrangements with Kurtz for a portion of the season after he had canned his loganberries, to use his help and can some for myself. Later on in the season we found that the help was not competent, that the cans had not been properly sealed, that they may not have used the right temperature, and we did have some trouble over swollen cans that year, but it was not due to the fruit because we shipped those same loganberries from Salem to Sumner and

(Testimony of H. A. Baker.)

packed them there without any difficulty whatever. The trouble was in the canning of the fruit; with the cans; it wasn't in the fruit.

Q. Now, in packing the berries in the barrels, something has been said here about mashing them down. I wish you would explain to the jury just how they are packed in the barrels and what the process is.

A. Why, as far as mashing them down, it does not make any difference at all whether they are mashed at all. A mashed berry will not ferment any quicker, probably, than a whole berry that is exposed to the air. It might depend on the air. If it is moist air the whole berry would probably not ferment, but it would get whiskers, as they call it, quicker than the mashed berry. It is a custom with some packers, my competitors Armour & Company, Armour and Company make it a practice to mash the fruit all up. They think it is better that way. It is a matter of weight. We don't make any claim at all, if it mashes it don't make any difference. The weight itself will mash [138] the meat part of the berries anyway. It doesn't injure them at all, if they are kept at a right temperature.

Q. Now, it has appeared in the testimony thus far, Mr. Baker, that these berries were handled by trucks from your packing plant to the cold-storage plant in Portland. Will you state what is the practice in that respect as to getting them into

(Testimony of H. A. Baker.)

cold-storage plant by trucks and what the advantages are over the disadvantages, if there are any?

A. Why, going back to my early experience in 1909 and 1910 and '11 and '12 and '13, until we got trucks, we had to watch every car that went in. We had very little difficulty, but even so we had to watch it carefully. The railroads are not as reliable as the trucks. The trucks, we can keep a check on them, they are guaranteed to give us service not longer than six hours. They gave us better than that, three and a half to four hours, according to their testimony, but take it with the railroads, I have shipped some from Salem by rail; it was packed, say to-day, it was put on the car to-night, if it was put in cold storage next night we were in luck. And I have shipped at Hammond, Louisiana, which is a hot country, down to New Orleans, a distance of about eighty miles by rail, and if it got in in forty-eight hours we were in pretty good luck, and yet we had very little difficulty. Truck service is infinitely better than the other, the hard tire cuts no figure. The weight of the berries themselves will mash it.

Q. Those were barreled goods you are speaking of? A. Yes, we had no cannery down there.

Q. And prior to the time they got into cold storage? A. Yes.

JUROR.—Can you account for why those few barrels, some of them fermented before they got to Portland?

(Testimony of H. A. Baker.)

A. Why, it is just like packing a bunch of apples here east, a few apples will ferment or rot before they got into cold storage and cooled down. The percentage is small. Now, I have handled as high, in 1919 I packed about a million four hundred thousand dollars worth of barrels. My loss that year was less than one thousand dollars through fermentation, so you can figure for yourself how small the loss is. You can figure from these warehouse receipts. 1630 barrels of [139] loganberries and I don't think there is over ten or eleven barrels arrived in bad condition. Now, if the percentage was high we would have to give up the business, it would not be a successful business. It has made the fruit business, this barreled business has.

Q. Now, Mr. Baker, something has been said, also, in one or two years prior to 1919 of having ice in the barrels. I wish you would explain to the jury how that—first of all, what was the practice, when the barreled business first began, then how did this ice in the barrel practice come in, and if it has been discontinued, why so?

A. When I first commenced barreling I tried out all the fruit, different degrees of shipping, different temperatures, different service, and we never thought of ice. But our competitors started putting ice in the barrel. He may have thought it a good scheme, may have thought it cooled the barrel off, but as a matter of fact it didn't make any difference, but as a matter of competition I had to

(Testimony of H. A. Baker.)

put in ice the same as they did. Take in 1920 we bought ice at five dollars a ton, I forget the exact figure, it may have been six or four. We were paying six cents a pound for loganberries. If our competitors were putting in thirty, forty, fifty pounds of ice, no matter what that may be, and sell the whole as loganberries, we could not meet the competition, we had to do the same thing, and I think it was in about 1918 that the Government found out about it through their inspectors and notified us all we would have to stop or mark it on the barrel, so then we stopped. As soon as the others did we stopped. I don't think anybody used ice. The man who used ice the most and I think probably started the scheme was a man named Mays at Independence. Also I think he was the man used more ice than anybody else, but we had that competition to meet all over the country.

Q. Now, Mr. Baker, coming down to the storage with the National Cold Storage people, you had had some experience in storing with [140] these gentlemen in years prior to 1920?

A. Yes, I think I started storing with the National Ice about 1913. At that time my business was in charge of Mr. Pine, Mr. Lucius Pine, and we instructed them at that time what temperature to carry the fruits, that is about eighteen to twenty-four; that is what they were told; eighteen to twenty-four is very satisfactory providing they can keep the temperature down to that, and we had no claims

(Testimony of H. A. Baker.)

against the Reids; we have done business with them more or less ever since. I think nearly every year.

Q. Did you have occasion to discuss with them this question of temperature in succeeding years after you first began doing business with them?

A. We did have. I think two or three years. It was my custom to notify my cold-storage plants about the temperatures they should carry these goods, until that business is established, they knew what they should keep it at.

Q. So that, as I understand it, beginning with the season of 1920, it is true, is it, that there was no particular conversation about the temperature to be maintained there?

A. It should not have been necessary. They have been carrying our goods for years at proper temperatures and with success; we had had no losses and we never made a claim against them.

Q. Beginning with the season of 1920, what was the rate that they charged you for the storage facilities that year?

A. Why, that year they were charging us $1.15 a barrel for the first month, supposedly to cover—the previous year they had been charging us, I think, sixty-five cents. That was supposedly an increase to cover freezing. That is when they were expecting to put in additional machinery and put in a freezing-room.

Q. And the charge made against you for the first month, was that [141] at the rate of $1.15?

A. Yes, sir.

(Testimony of H. A. Baker.)

Q. And you say that fifty cents of that was to cover freezing? A. Yes, sir.

Q. What do you mean by freezing?

A. Why, ordinarily the term, among the cold storage plants, is used where they have a room that will run from one to ten or fifteen above zero. It is where they run—I think the term originated with fish. They will put in fish and freeze it up solid in that freezing-room, and then they will put it in temporarily we will say twenty-seven or twenty-five—some temperature below freezing, and for the first few days they run it through this extremely cold room, freeze it. The freezer, too, I think is used for meats. They will keep meats, I think, in what they call the freezer, this low temperature.

Q. The bills rendered you were at the rate of $1.15 for the first month, and covered fifty cents for freezing, you say. Were your loganberries frozen in the way you have described that term?

A. No, sir; I think they were intending to get that freezer completed that year.

Q. You were around the plant of the cold storage company?

A. Yes, sir; I was in and out there several times during the season.

Q. And does the freezer-room—is that ordinarily different from the storage-room?

A. Why, the freezer usually contains more pipes. Now, pipes don't include everything. They have got to have compressors and plenty of ammonia forced through their pipes, or they cannot get the

(Testimony of H. A. Baker.)

temperature down, even though they have plenty of pipes, unless they have compressors to pump the ammonia through those pipes, keep that in circulation. If it is ammonia. Sometimes it is brine. There are two or three different systems. Some are [142] ammonia system and some are what they call salt system or brine system.

Q. This cold-storage room of the defendants, how was it equipped in that season of 1920 as to thermometers?

A. I never saw but one thermometer there; it was a common, straight tin thermometer.

Q. Well, do you know of facilities that are available for automatically registering the temperature?

A. Why, the usual cold-storage plants have an automatic thermometer; that is one which has an arm that registers the temperature each hour of the day and those cards, or whatever they may be called, are filed away for reference, showing the temperature that existed during the entire twenty-four hours of that day. And there is a reason for that, because if an employee happens to go to sleep at night and doesn't keep up his temperature it is easily shown on that card, just the same as the time card in the factory.

Q. Now, if you don't have one of those automatic devices, what is the fact as to whether or not a great deal more personal attention is required to be given by the people operating the cold room in watching the old fashioned thermometers?

(Testimony of H. A. Baker.)

A. Why, this is very simple, they can just glance at it and see where the needle is. They take it off every day and put on a new one, whereas with an old thermometer they have to look at it every couple of hours to see whether the room is going up or going down.

Mr. SPENCER.—Mr. Boothe, have you the original letter of July 15 written by Mr. Baker?

Mr. BOOTHE.—Yes.

Q. Mr. Baker, I hand you a letter dated July 15, purporting to have been written by you, and ask you if you identify it? A. I do.

Q. To whom did you write the letter? [143]

A. To the National Ice and Cold Storage Company of Portland, Oregon.

Q. And you wrote it with reference to the attention to be given to these particular goods that you were storing there? A. Yes, sir.

Mr. SPENCER.—I will offer the letter in evidence.

Mr. BOOTHE.—No objection.

Letter received in evidence and marked Plaintiff's Exhibit 3.

Mr. SPENCER.—It is dated July 15, 1920. "Tacoma, Washington. The National Ice & Cold Storage Company, Portland, Oregon. Gentlemen: We are storing barreled goods with you, and wish you would wire this office at any time any of the barrels show distress. Should any of them commence to bulge at the head, take a 6 or 8 penny nail, drive it through the head three or four times,

(Testimony of H. A. Baker.)

withdrawing it and allowing the gas to escape—and at all times notifying me and Van Doran." Signed "Yours very truly, H. A. Baker."

Q. What was the occasion for writing that letter, Mr. Baker?

A. Just a matter of precaution. They may have a few barrels and we want to keep in touch with the cold-storage product.

Q. Had you given advice to other cold-storage concerns when you were doing business with them?

Mr. BOOTHE.—I object to that, your Honor, I object to the question.

Mr. SPENCER.—All right, I will withdraw it.

Q. Now, when did you come down to the cold-storage plant after July first, 1920?

A. Why, shortly after this date, I think about the twenty-second or twenty-third, I commenced to order out barreled loganberries to go east. I think I had shipped about two carloads to St. Louis which arrived in good condition. I came down here on the thirty-first of July and went through the barrel room—through the cold [144] storage with Mr. Van Doran and I remarked at that time that I had never seen a lot of barrels in better condition. Absolutely there were very few barrels that were stained and the storage was to be complimented on the condition in which they were at that time.

Q. How was the refrigeration, as far as you could determine?

A. The pipes were thoroughly frosted, showing that the room was cool, and none of the barrels to

(Testimony of H. A. Baker.)

speak of was showing distress, very few, indeed. And I consequently gave orders for further shipments to go east.

Q. You gave orders for further shipments to go east? A. Yes.

Q. Then when did you next hear of the matter of the barrels?

A. I was in Bellingham I think it was about the fourteenth of August, I think, I got a wire from my office in Tacoma, Mr. Kelly—

Q. Well, I don't think it would be proper for you to state what passed between you and Mr. Kelly.

A. I got a wire that the barrels were in bad order. I immediately wired Mr. Van Doran to go to Salem at once and take care of them.

Q. Go to Portland?

A. I mean go to Portland and take care of them.

Q. Then what next happened?

A. Why, I received a wire from Mr. Van Doran, I think it was on the sixteenth.

Q. Of August.

A. Yes, I think we have the wire.

Q. And were you then advised that the temperature—

A. He advised me that the temperature was up to thirty-six.

Mr. SPENCER.—I don't want to lead the witness, I want to get along.

Mr. BOOTHE.—Let him testify, he is here.

Q. You say he advised the temperature was above thirty-six? [145]

(Testimony of H. A. Baker.)

Mr. BOOTHE.—I object, your Honor; let Mr. Van Doran—

Q. Well, all right, what did Mr. Van Doran tell you?

Mr. BOOTHE.—What did he do.

Q. What information about that time did you get as to the temperature; from whom?

Mr. BOOTHE.—I object, your Honor, to information from anybody else besides this defendant.

COURT.—Has it reference to some act on his part?

Mr. SPENCER.—He immediately wired the Cold Storage Company, begging them to get the temperature down.

Mr. BOOTHE.—Let him come to that.

Mr. SPENCER.—Will you produce the telegram of August sixteenth or seventeenth from Mr. Baker to your people?

Mr. BOOTHE.—I think this is the one. The date is not very clear. Look at it and see.

Mr. SPENCER.—That is the one.

Q. I will hand you a telegram, Mr. Baker, which purports to have been sent by you and ask you if you did send that telegram?

A. I did, yes, sir, from Bellingham.

Mr. SPENCER.—I will offer the telegram in evidence.

Mr. BOOTHE.—No objection.

(Telegram received in evidence and marked Plaintiff's Exhibit 4, and read as follows:)

(Testimony of H. A. Baker.)

"Bellingham, Washington, 16. National Cold Storage and Ice Co., Portland, Oregon. Van Doran wires me that temperature of room is up to thirty-six. You know you will be liable for any loss at this temperature. Each barrel is worth about seventy dollars. I beg you to get the temperature down to twenty-six or lower. Will ship out very fast now, but barrels should be cooled to twenty-six before loading. H. A. Baker."

COURT.—What is the date of that?

Mr. SPENCER.—It says Bellingham, Washington, sixteen. It has August 16, 1920, at the top of the message.

Q. Well, then, what did you do, Mr. Baker, did you come down, or what [146] happened next?

A. As soon as I could get here I came down. I think it was about the twentieth of August. I found the barrels in a most deplorable condition. I never had seen anything like it in my life. There were nail holes in the tops of the barrels and the juice—you could stand there and listen and hear them bubble here and there and the other place and see the juice oozing from the barrel, even over the chimes and out on the floor, enough to make you sick.

Q. And what did you do, if anything—or, rather, what did you observe as to the temperature of the room at that time?

A. The temperature of the room at that time was about thirty-six.

COURT.—About what, did you say?

(Testimony of H. A. Baker.)

A. About thirty-six.

COURT.—That was the twentieth?

A. Yes. Let me see. I think it was a little lower than that. I think it was about thirty-four, if I remember correctly.

Q. And what was the condition of the pipes as to showing complete refrigeration or whether the juice was in the pipes at that time?

A. I think the pipes at that time were partially frosted. They were about half frosted over one-half of the room. I think, if I remember rightly, the room was about—high on one side; one-half of the room was down and the other half of the room was up in temperature.

Q. Well, do I understand you that the pipes were frosted—

A. Frosted about halfway across the room and under the pipes where it was frosted the temperature was down to a lower degree than where it was in the other half of the room, where there was no frosting on the pipes.

Q. Well, what was the condition of the barrels at that time on the—Oh, that was the next visit, you came down on the twentieth?

A. Yes. [147]

Q. What was done, then, if anything, with reference to the barrels? Did you have any conversation with the Reids at that time?

A. Why, yes; I implored them to get the temperature down to save this fruit, if possible. They stated to me at that time that they were doing the

(Testimony of H. A. Baker.)

very best they could, that they had a lot of ice contracts, as I remember it, they had made contracts with the railroads, to furnish ice for re-icing for cars that were coming through Portland, and that they had planned for new machinery and that they had been unable to get this machinery; that they had made contracts for ice and that the ice companies were forcing them for more ice and they had to take the juice off of our room to make this ice. That they didn't have compressor capacity.

Q. Well, now, why didn't you take your loganberries out of the cold storage, out of their premises at that time and take them to some place else?

A. They were in such condition if we had moved them at that time, the air that is in the barrel, they would have blown all over; we would have lost them. The only thing we could do was to implore them to get the temperature down and then, if necessary, get them out. If they had advised me earlier that they were not able to keep the temperature down I could have then run them into Seattle and had no difficulty and it would have only cost me about one dollar a barrel to do it; the freight rate I think was about fifty cents, but after the barrels were fermented the worst thing to do is to move them around.

Q. When were you down here, then, the next time after the twentieth of August?

A. I think I was here about ten days after that, something like the twenty-ninth or thirtieth, it was.

(Testimony of H. A. Baker.)

Q. And what did you find as to the condition of the berries and [148] the room at that time?

A. I found the room, then, they had reversed things, the frosting was on the other side of the room and on this side Mr. Van Doran I think had reported that the thermometer was down. When I came to investigate I found by moving the thermometer from one side of the room to the other side of the room there was a vast difference in the temperature and I found by looking at the pipes they were frosted where the temperature was low, the pipes would be frosted above it. It was a very large room, larger than usual for a cold-storage plant.

Q. Now, what did you do toward attempting to save the product after this fermentation had been evident in it. What I mean is, did you sell it or undertake to ship it?

A. Why, we had then in transit five or six cars, I think four or five cars—five cars, we will say, that had been shipped out between the first of August, and when the difficulty arose, we will say the sixteenth of August. One of the cars that were shipped into Chicago—

Mr. BOOTHE.—Your Honor, I object to that, to this answer, and move to have it stricken out. That has nothing to do with these barrels that are in question. What he had shipped to Chicago had nothing to do with this, these particular goods we are dealing with, these 398 barrels that he says were in cold storage at that time.

(Testimony of H. A. Baker.)

Mr. SPENCER.—The fact of the matter is, your Honor, it is our position in this case that the same treatment was given to all of the barrels as to those that were shipped out prior to about the first of August. I think there were about two cars which went out prior to the first of August. It was after the first of August that the temperature went up to thirty-six degrees and stayed there some time, and it is our notion about it that the same [149] thing happened, substantially, to all of those barrels of berries that were subject to that rise in temperature. My idea about it is that berries that were subjected to that that went east and arrived in bad order are in just the same shape as these are here now in bad order.

COURT.—You are not claiming—

Mr. SPENCER.—We are not claiming any damage for those that went east.

COURT.—They were in there at the same time. He may answer.

Mr. SPENCER.—We are not claiming any damages to those that went east at all, because they were sold to other people.

Mr. BOOTHE.—Note an exception.

A. The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about between fifty and sixty per cent; I understand there was about one hundred

(Testimony of H. A. Baker.)

barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty to sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad condition and all that were shipped arrived after that—between that time and when I stopped them, when I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation.

Q. You shipped, as I understand your earlier statement, two cars prior to August first?

A. Two cars were shipped to St. Louis, containing one hundred and five barrels each, which arrived in good condition. [150]

Q. No claim was made against you or anybody else as to that? A. No, sir.

Q. But as to the barrels that were in there on August first and were shipped out after that date, or were put in after that date and subsequently shipped out, what is the fact as to whether or not claims have been made against you on account of the fermented condition—bad condition?

Mr. BOOTHE.—I object to that, your Honor. Those goods were shipped a long ways in refrigerator cars, probably three or four weeks reaching their destination.

COURT.—I think it is a circumstance; whatever the jury think it is worth, of course.

(Testimony of H. A. Baker.)

A. Why, most of them arrived in bad condition, excepting these I have just mentioned, the two cars.

Q. Have you had much experience in shipping barrels of loganberries after they have been refrigerated in cold-storage plants to eastern points?

A. I think so; more than any other two people, probably, in the United States.

Q. And your experience as a packer, does it include also the shipping of loganberries to eastern points? A. Yes, sir.

Q. In barrels? A. Yes, sir.

Q. I wish you would give the jury, just in a general way, some idea of the extent of that. You have already stated more than two men, probably. How many barrels do you suppose you have shipped to eastern points?

A. Just a moment, let me think it over. You mean just loganberries.

Q. Yes, loganberries, before these loganberries.

A. I presume I have shipped fifteen to twenty thousand barrels in my experience. [151]

Q. By refrigerator-car shipments?

A. By refrigerator-car system.

Q. And what has been your experience as to encountering loss?

A. I have never lost a barrel in shipping by refrigeration. We have had some loss, but not loganberries, where there was lack of ice, but those are very exceptional. When I say I shipped one hundred thousand barrels in my experience, that would be a thousand cars. We have had occasion to put

(Testimony of H. A. Baker.)

in a claim for three carloads out of that thousand, in my experience, because of lack of ice.

JUROR.—Were these shipped under ice from Portland when they left here? A. What?

JUROR.—Were those under ice when leaving Portland?

A. We sent under ice and under salt. We have them iced and salt the car at every icing station and they add fifteen per cent of salt to the cracked ice. Not only ice, but it has to be cracked ice, and fifteen per cent of salt added. Mind you, the barrels go into these refrigerator-cars, are supposed to go in absolutely cold out of a room that is at least twenty-four degrees temperature.

JUROR.—And they are iced at stations along roads?

A. And then they are iced at all stations along the road. We have never lost, if I remember correctly, I think only lost three cars out of about a thousand cars I have shipped in my experience.

Whereupon recess was taken until June 13, 1922, at two o'clock P. M.

Portland, Oregon, Tuesday, June 13, 1922, 2:00 P. M.

H. A. BAKER, resumes the stand.

Direct Examination (Continued).

(Questions by Mr. SPENCER.)

Mr. Baker, I hand you what purports to be a [152] telegram from the National Cold Storage and Ice Company, and ask you if you identify that?

(Testimony of H. A. Baker.)

A. I do, yes, sir.

Q. What date does it bear?

A. August 21, 1920.

Q. And did you receive that by telegraph?

A. I received that by telegraph at Tacoma.

Mr. SPENCER.—I will offer the telegram in evidence. It is dated August 21.

Mr. BOOTHE.—No objection.

(Telegram received in evidence and marked Plaintiff's Exhibit 5.)

Mr. SPENCER.—This is a telegram dated Portland, Oregon, August 21, 1920. (Reads as follows:) "H. A. Baker, 322 Tacoma Building, Tacoma, Washington. Temperature basement now 27. Bubbling stopped floor clean. Have taken refrigeration off ice tank to do this. Expect 25 degrees to-morrow. National Cold Storage & Ice Co."

Q. Mr. Baker, do you know anything about the fermentation of fruits, particularly loganberries?

A. Why, whenever there is fermentation there has got to be carbonic acid gas formed and whenever there is carbonic acid formed you will find it has got to press somewhere. If there is any fermentation in the barrel it is bound to show at its head by bulging, consequently if there is any trouble anywhere in the way of fermentation, it is going to show in the barrel either through leaking or bulging of the head.

Q. Have you had any experience in chemistry?

A. Yes, sir, I have studied chemistry four years,

(Testimony of H. A. Baker.)

years ago. I used to be in the drug business years ago.

Q. Fermentation of loganberries, what caused fermentation of loganberries? [153]

A. Why, fermentation usually is caused by heat—must be caused by heat. Temperature is too high. If you keep the temperature down there is no trouble; if the temperature goes above freezing usually there is some fermentation.

Q. Do you know what the temperature should be to keep a berry, such as the loganberry, from fermenting?

A. Why, I presume that a little below freezing would keep barreled fruit after they had once been reduced to that temperature in the center of the barrel, but in order to get the heat in the center of the barrel out of it, it ought to be put in a room—I have always directed them, say from sixteen to twenty-six, or eighteen to twenty-four, but after the heat is out of the barrel, why probably twenty-eight or twenty-seven might keep it, but it is too risky. I have always directed them to keep the temperature down to twenty-six and oftentimes I have directed them twenty-four.

Q. What is the effect on barrels of berries which have been put in the refrigeration-room when you are constantly moving in new barrels and storing them with them?

A. Why, naturally the heat that is in the new barrels, usually the berries—I think it has been tested out, in ordinary weather berries that are in

(Testimony of H. A. Baker.)

crates and put into a refrigerator-car will run about eighty and those berries, when they come into a refrigerator plant naturally would run somewhere about seventy-five, eighty to the barrel, and the sugar would naturally cool it off a little, and that heat has got to be taken out of that barrel, either by the barrels next to it or by the piping.

Q. And if the barrels in the first instance are not put into a freezing-room and frozen, then what would you say would be the requirements in the way to keep up additional refrigeration in the room into which the berries are being moved and in which they are already stored?

A. Why, it is getting to be the custom—is that when you mean, [154] freezing them in another room first?

Q. Yes.

A. They are using that more or less now. I haven't always found it necessary. They are now running the berries into a very cold room, from one below zero to fifteen above, to take the heat out, and then run them into a room around twenty-four or twenty-five. That is not absolutely necessary, if the room they are put in first is kept down to twenty-four or twenty-five, while the heat will come out of the barrel slower it will come out sufficiently fast to prevent the berries from fermenting, but the temperature has got to be kept down to that.

Q. Now, what is the effect upon the berries if the temperature is allowed to go above freezing, to

(Testimony of H. A. Baker.)

thirty-six degrees, we will say, and remains there for as much as four or five or six days?

A. Why, they are bound to ferment, and of course that is shown by the gas that comes from the top of the barrel.

Q. And as soon as they have reached a stage of fermentation produced by that treatment what is the effect upon the loganberries as to their food value?

A. Why, it is destroyed. The United States Government will not allow its use. It is like vinegar. It has gone into the first stage of fermentation, as sugar to alcohol, alcohol to acetic acid. Whenever there is alcohol formed there is always some acetic acid. You can't prevent getting a little acetic acid.

Q. From your knowledge of these berries—

A. How?

Q. I say, from your acquaintance with these berries that were subjected to this change in temperature in the cold-storage plant, the berries in question— A. Oh, yes. [155]

Q. These 398 barrels, what would you say is their value—their food value?

A. Why, they are worthless. The Government would not allow us to sell.

Q. Is there any way that you know of by merely adding sugar and bringing those berries back to their normal stage? A. Absolutely absurd.

Mr. BOOTHE.—What is that answer.

Mr. SPENCER.—He said it was absurd.

(Testimony of H. A. Baker.)

A. It is just like bringing acetic acid back.

Q. Mr. Baker, Mr. Huntley, the first witness who was called in this case, testifies to making some—a chemical analysis of some of the samples taken from the barrels over there and that you accompanied him when he went there and got the samples. Now, I wish you would explain to the jury just how that was done, who went with you and what you did there.

A. I had taken several samples at different times during the summer. I had not realized at first that the trouble was as bad as it was. Of course that summer I had realized it. That was the previous year, this winter. I had taken several samples at different times and finally decided it was worthless and I had Mr. Huntley as an expert, a chemist, go down there with me, with his own eyes to see that he was selecting his own samples, and Mr. Patton went down with us.

Q. Who was Mr. Patton?

A. Mr. Patton is the foreman, as I understand it; he seems to have charge of it.

Q. Of the cold-storage plant?

A. Of the cold-storage plant. He took us down there and we wanted not only to pick out some loganberries out of the worst looking [156] barrels, we wanted some of the best looking. He was to give an unbiased opinion what the loganberries were, so he had a man come and open up some of the best looking barrels we could find there.

Q. Now, in the fall of 1920, what demand was there for loganberries on the market?

(Testimony of H. A. Baker.)

A. Why, on account of this large loss in fermentation we could not begin to fill the orders.

Mr. BOOTHE.—I beg your pardon; what was the question?

Mr. SPENCER.—I said what demand was there in the market in the fall of 1920 for loganberries?

Mr. BOOTHE.—I object to the fall of 1920. They claim this damage was done the last of July or first of August. If they were damaged at that time that is the time that the price should be fixed.

COURT.—He is not asking about the price, he is asking about the demand now.

Q. I will take the summer, then, the month of August and July, what demand was there in July or August for loganberries? A. 1920?

Q. Yes, sir. A. Very heavy.

Mr. BOOTHE.—What was the answer?

A. Very heavy in 1920.

Q. And did that demand continue throughout the fall of 1920?

A. Yes, we could not fill our orders.

Q. And had these loganberries been in the proper condition for handling as food when would you normally have moved them out of the cold-storage plant?

A. I think we would have had them cleaned up not later than probably January the first.

Q. January first, 1921? [157] A. 1921, yes.

Q. Or December 31, 1920?

A. December 31, 1920. You understand that on account of this fermentation there were some of our customers that had cancelled their orders.

(Testimony of H. A. Baker.)

Q. I understand. Where did you sell your loganberries, did you sell them, at that time?

Mr. BOOTHE.—If your Honor please, I object to this question. I want counsel to confine himself to the value of all those kind of things here in Portland, it is not in New York, or somewhere else.

Mr. SPENCER.—The market in New York is more or less dependent on the relation to our market in Portland.

Q. How are loganberries sold at Portland?

A. You mean in barrels?

Q. No, I mean loganberries you have here in cold storage, where do you sell them?

A. We sell them all over the country F. O. B. cold-storage in Portland. Portland is the market for loganberries of the United States or the world.

Q They are sold F. O. B. Portland?

A. They are sold F. O. B. Portland cold-storage. Cold-storage Portland; yes, sir. This is the leading loganberry market of the world and consequently governs the market of the world.

Q. And the loganberry prices in the summer and fall of 1920, were they made on that basis, F. O. B. Portland? A. F. O. B. Portland.

Q. I don't know whether you have covered the question, Mr. Baker, but I want again to inquire whether or not during the summer or the fall of 1920 there was a sufficient demand so that you could have moved all of the loganberries which you packed that year? [158]

Mr. BOOTHE.—I object to that question as im-

(Testimony of H. A. Baker.)

material and irrelevant, whether there was any demand during the fall or not. Was there a demand here in Portland at the time these goods were said to be damaged is the question, I think.

Q. Well, confine it to Portland, Mr. Baker.

COURT.—All right, the question is the market value in Portland.

Mr. BOOTHE.—And at the time of the alleged loss or immediately after.

COURT.—Any time.

Mr. SPENCER.—I think, your Honor, the rule is, market value is to be measured as of the time when the consignor who places the goods in the cold-storage plant would normally have moved them out. That is my understanding.

COURT.—In the ordinary course of business, yes.

A. What was that question, again?

Q. Read as follows: I don't know whether you have covered the question, Mr. Baker, but I want again to inquire whether or not during the summer or the fall of 1920 there was a suffcient demand so that you could have moved all of the loganberries which were packed that year? A. I think so.

Q. And at Portland, Oregon, in, we will say, August, 1920, what was the market value of loganberries of the character that you handled?

A. My contracts were on the basis of seventeen and a half cents. The market value would run, of some of my competitors, up as high as twenty-

(Testimony of H. A. Baker.)

two cents. My contracts early in the year were on the basis of twelve and a half cents.

Q. But the market value you say would have been somewhat in excess of that?

A. Yes, the real market value at that time was probably around twenty [159] to twenty-two cents.

Q. What was the market value in August of 1920 for loganberries in the field from the growers?

A. Why, we were paying thirteen cents and doing all the delivery and all the packing and trucking and cold storage and selling at seventeen and a half cents.

Q. You only had four and a half cents to go on, then, as a margin?

A. That is all. We figure on small profits and volume.

Q. Would you say, Mr. Baker, that the 398 barrels involved in this case were worth in the market seventeen and a half cents in August, 1920?

A. They were worth that.

Q. Did that value continue throughout the fall of 1920?

A. Yes, sir, I think fully that value. Quotations were made, I think, much higher than that in instances.

Q. Have you been able to sell these loganberries, use them? A. These fermented ones?

Q. Yes.

A. Why, some of those that were sent to Chicago we have not been able to clean them all up yet;

(Testimony of H. A. Baker.)

some were on contract and the buyers had to take them.

Mr. BOOTHE.—I object to that.

COURT.—Confine yourself to the 398.

Q. I want to know about the 398 barrels, have you been able to sell them? A. No.

Q. And for what reason?

A. Because they are not fit for human consumption.

Mr. BOOTHE.—What is that?

A. They are not fit for food. The buyers have all rejected them.

Mr. SPENCER.—You may cross-examine. [160]

Cross-examination.

(Questions by Mr. BOOTHE.)

Did you try to sell them to anybody here?

A. You mean here in Portland?

Q. Yes.

A. There is very little market here in Portland for loganberries, because they pack their own stuff. Our market is in the east, a big market.

Q. There was no market here for those berries in July and August of 1920? A. Yes.

Q. Who was buying here?

A. Through my brokers here or Jones & Company, of Chicago.

Q. Was there anybody in Oregon buying for anybody in Portland in July and August, 1920?

A. We don't look to Portland as a consumer, we look to our market in Chicago, for instance, Cincinnati, St. Louis.

(Testimony of H. A. Baker.)

Q. You have to take your chance of selling when you ship them?

A. Very small, only three cars in a thousand.

Q. Did you try to find any buyer for those goods in Portland during the month of August, 1920?

A. During the month of August, 1920; yes, sir.

Q. Who did you try?

A. Try, why, we were offering loganberries in 1920 until we ran into this fermentation.

Q. Did you show them to anybody?

A. These particular berries?

Q. These particular berries.

A. In August, 1920?

Q. Yes.

A. We could not, very well, Mr. Boothe— [161]

Q. Did you show them to anybody?

Mr. SPENCER.—Finish your answer.

A. We could not, very well, Mr. Boothe, because they had been thoroughly fermented out at that time. You don't know what shape they were in. As I told you before in my testimony, we shipped out in August car after car and they arrived back in Chicago in bad order, we could not go any faster than we did and had to stop.

Q. On July 31 they were all in good condition, you say?

A. All those that were in there on that date.

Q. Were you trying to sell them at that time?

A. Why, we were selling them at that time.

Q. Well, were you trying to sell these 398 barrels?

(Testimony of H. A. Baker.)

A. We could not look forward to these 398 barrels, we didn't know about this thing coming up at that time.

Q. Isn't it a fact that the market for loganberries went down, down, down, during the fall of 1920?

A. No, sir.

Q. You were not present when those berries were put into the plant, were you?

A. Into what plant?

Q. Into the cold-storage plant. A. No, sir.

Q. You don't know of your own knowledge what condition they were in, do you?

A. I do what I saw there on July 31st, yes, sir.

Q. You say that at that time they were all in good condition?

A. All that I could see and I think I saw practically all of them.

Q. What was the date that you and Mr. Huntley went to the plant to get that sample?

A. It was along late in October.

Q. What year? [162]

A. 1921.

Q. 1921? A. Yes, sir.

Q. And how did you get the goods out of the barrel, did you break the barrels?

A. Why, in some instances the stave was broken, in other instances the head was taken out and then we took some of the berries which were in the barrel.

Q. How many samples did you take?

(Testimony of H. A. Baker.)

A. We took samples out of about eight barrels, I think.

Q. How many times did you go there to get those samples?

A. Only once with Mr. Huntley. I was there with myself, alone; I think I took samples three different times.

Q. Did you tell Mr. Reid you were there, or ask for Mr. Reid?

A. You mean when? Before then? Mr. Reid knew I took samples out of there. I think he was with me once when we went down there and took a sample. Not when Mr. Huntley was with me.

Q. Did you ask for Mr. Reid when you went there with Mr. Huntley?

A. I am not sure. It was not necessary. Mr. Patton was there and I think he took me down. Whether Mr. Reid was there I am not sure, but I am inclined to think he was.

Q. Why didn't you get Mr. Reid and give him a chance to assist you?

A. I wanted a sample of that fruit, it didn't make any difference to me whether Mr. Patton gave it to me or Mr. Reid gave it to me.

Q. You wanted to get it without Mr. Reid knowing about it?

A. I think Mr. Reid was there, if I remember correctly, but I would not swear that he was. I know Mr. Patton took me down there.

Q. You were not very anxious to see Mr. Reid at that particular time?

(Testimony of H. A. Baker.)

A. It was immaterial, as long as I got the sample.

Q. Long before the first of August you knew that these berries were [163] fermenting, didn't you?

A. Along before the first of August?

Q. Yes. A. In 1920?

Q. In 1920. A. Absolutely not.

Q. You did not? A. No, sir.

Q. I call your attention to a letter of July 15, 1920, to the National Cold Storage & Ice Company, wherein you say, "We are storing barreled goods with you and wish you would wire this office at any time any of the barrels show distress." Why did you expect distress in them?

A. Why, that is simply a precaution, as I explained before. No, I didn't expect not to amount to anything other than an occasional barrel, as testified by the warehouse receipts here.

Q. And you say further: Should any of them commence to bulge at the head, take a six or eight penny-nail, drive it through the head three or four times, withdrawing it and allowing the gas to escape—and at all times notifying me and Van Doran.

A. Yes, I think—didn't I say in that to wire me immediately so that it could be taken care of to save any loss that might occur to that lot?

Q. Then you either knew or expected your berries would ferment?

A. No, I didn't know or expect it, because we took that precautionary measure in nearly every instance. Do you think I would put berries in there

(Testimony of H. A. Baker.)

if I expected them to ferment? Do you think berries costing me seventy dollars a barrel I would put in and let them ferment?

Q. I am asking you whether or not you anticipated their fermenting? A. No, I didn't. [164]

Q. Then why did you write this letter?

A. Just as I told you, because it was a precautionary measure to let them notify me immediately that we might stop any loss if fermentation occurred.

Q. Did you direct your truck drivers to drive any nails in these barrel heads before they got them to the cold-storage plant?

A. I had nothing to do with the truck drivers, but I am sure they were not.

Q. Do you know whether any of those barrels when they came to the cold-storage plant were plugged?

A. I never saw the barrels before they came to the cold-storage plant.

Q. You don't know whether they were plugged, do you?

A. I never saw them, except occasionally I was down at the plant, but I didn't see anything of the kind and the testimony of the boys would indicate there wasn't any.

Q. Did you at any time before these berries were placed in the National Cold Storage Company's plant direct them what temperature they should carry?

(Testimony of H. A. Baker.)

A. Why, yes, several years ago that had been taken care of properly.

Q. I am asking you about these 398 barrels?

A. About these 398 barrels? Custom, I think, covered that.

Q. What is that?

A. Custom, I think, covered that.

Q. Well, you did not direct them what temperature to maintain?

A. They had taken care of my barrels for years at the right temperature and they were instructed at that time and that covered these 398 barrels.

Q. You simply expected them to use their own judgment, such as they thought was necessary to take care of the berries?

A. No, they ought to have judgment at that time, after taking care [165] of them for years.

Q. I am asking you if you expected them to use their own judgment?

A. Yes, but qualify that. They were qualified after all these years of experience.

Q. You will get that in, but I would like to know, now, I am asking you again if you told them?

A. They charged us $1.15 a hundred and it should have covered freezing.

Q. You haven't answered the question yet.

A. Added fifty cents a barrel, which covered freezing.

Q. Added fifty cents a barrel; that was to cover freezing, but did you tell them what temperature they should maintain on those goods?

(Testimony of H. A. Baker.)

A. Sure, yes.

Q. What was it?

A. From eighteen to twenty-four.

Q. When did you tell them?

A. Two or three years previous; four or five years previous, every year.

Q. You didn't tell them that about these particular berries, did you?

A. Man alive, they had been storing there for years, every year. They must have known the temperature. It could not be any different in 1920 from what it was in 1919 or seventeen or sixteen.

Q. I show you a letter and ask you if that is your signature; if you wrote the letter?

Mr. SPENCER.—What is the date of that letter? A. September seventh.

Mr. SPENCER.—Seventh?

Mr. BOOTHE.—Yes. A. Yes, I wrote that.

Mr. BOOTHE.—I offer this letter in evidence.

Mr. SPENCER.—No objection. [166]

Mr. BOOTHE.—I will read it to the jury now. (Reads as follows:) "Tacoma, Washington, 322 Tacoma Building, September 7, 1920. National Ice & Cold Storage Company, Portland, Oregon. Gentlemen: I wish you would kindly write me to the effect that you will assume the loss, due to fermentation on loganberries received by you this year from me in good condition. This is simply to confirm my conversation with Mr. Read, which I had when last in Portland—covering loss sustained by reason of the temperature in room being allowed to

(Testimony of H. A. Baker.)

go up to 36. Mr. Read stated at the time that there would be no equivocation. That he would speak to his father and forward me this assurance. It is my intention to make this loss just as light as possible, and an agreement on both sides will help the matter very materially. I wish you would load out one car containing all the strawberries which I think amount to 42 or 43 barrels, and sufficient loganberries to make up 100 barrels. This car to be shipped open billing to H. A. Baker, care of Western Cold Storage Company, 16th and State Streets, Chicago. Be very careful about having the car thoroughly braced and iced and salted. Also be very careful that every barrel that is placed in this car is in perfect condition. All barrels that have been vented should be plugged again and the heads cleaned up, also the sides of the barrels, so that they will not have the appearance of having been in distress. You will kindly notify Van Doren (interlined "Wire Van Doren when ready"), so that he may be with you when this car is loaded—and I am writing him to that effect. Yours very truly, H. A. Baker. P. S.—On second thought, I want you to cut down the temperature in that room to 24 for two days before this car goes out.

(Letter received in evidence and marked Defendant's Exhibit "A.")

Q. Now, when you wrote this letter you knew that some of these barrels had been plugged, did you not? [167]

A. I saw them there on August 20th, when I was

(Testimony of H. A. Baker.)

down there; there was a great many, nearly all the barrels had nail holes in them; they were oozing out.

Q. And you had previously directed them to drive six or eight penny-nails into the barrels to let the gas out?

A. Who?

Q. To the defendants.

A. Yes, and wire me immediately.

Q. And knowing that these barrels had been fermenting—

A. That would really cover the barrels when they came in from the drivers, if they came in in a bad shape, not to let the temperature run up and plug every barrel and let it out.

Q. Now, you seem to be very particular about the government not letting you sell berries that had been fermented? A. Yes, sir.

Q. Yet, notwithstanding this fact, on September seventh, after you knew those barrels had fermented, you wanted these people to plug them up very carefully and cover it up and clean the barrels so that it would not be discovered that they had been in distress? A. Yes, sir.

Q. You were willing, then, to sell these distressed berries to an innocent party, notwithstanding the Government?

A. Yes, sir; I didn't realize they were so *bar* as they were. My heavens, I had no idea.

Q. You knew they were bad?

A. I didn't know they were as bad as they were. I thought it was a slight fermentation. I had no

(Testimony of H. A. Baker.)

idea they were rotten as they were. Just as soon as that car went out, got back to Chicago, we stopped shipping them. I haven't shipped any since.

Q. Didn't you say when they were fermented they were spoiled for food? [168]

A. After wholly fermented. I said the 398 barrels were wholly fermented.

Q. And if they were fermented at all, so that they were sizzling in the barrels, they are fermented so that they are not fit for food?

A. I didn't say that.

Q. Is that a fact?

A. I said if they ferment all the sugar out of the fruit, so that there is nothing but alcohol and acetic acid left. That is the condition of these. When I shipped this car I thought it was only partial fermentation. I didn't realize until later it was complete fermentation.

Q. Yet you had been there on the sixteenth day of August and said it was fermenting so it had made you sick.

A. Yes, it did make me sick, seventy dollars a barrel going up in the air.

Q. Yet notwithstanding that fact you thought it was only slight fermentation when you were going to sell them?

A. I didn't think it was complete fermentation.

Q. Why did it make you sick?

A. When you get stuff that is fermented at all you have got to make a big discount to your buyer.

Q. I know, but you knew, according to your own

(Testimony of H. A. Baker.)

testimony, you knew they were fermenting? Here about on the sixteenth of August it made you sick and yet on the seventh of September, knowing that fact, you ask these people to plug them up and smooth them up and send them back to enable you to sell them to the public, knowing that fact. Now, isn't that true?

A. You put it a little strong.

Q. Doesn't that writing say that?

A. I didn't realize it was as bad as they were. I thought it was [169] partial fermentation.

Q. Now, Mr. Baker, if you didn't realize they were as bad as they were and thought it was partial fermentation, they had some value, did they?

A. I found out it was complete fermentation when I got them back there. It was complete fermentation.

Q. But on the seventh day of September you thought that there was only a slight fermentation and that the berries were good and salable?

A. I didn't think they were good and salable.

Q. What did you want to sell them for?

A. I was going to sell them for what they were worth. We didn't sell them, we sent them back to Chicago. Those are not sold. We sent them back to Chicago to see what we could do with them. We soon found out we could not do anything with them.

Q. You wanted them to ship one hundred barrels?

A. To myself; I didn't ship those to any customer. I took them back to see whether they could

(Testimony of H. A. Baker.)

use them or not. I wish to Heavens I hadn't. I wish they were right here in Portland now.

Q. You wanted the sides of the barrels plugged up, so that they would not have the appearance of having been in distress?

A. That is so, exactly. I didn't think they were so bad until I got them back there and sent to our customers and they turned them down.

Q. I want to know if you thought those berries had value September seventh?

A. I thought they did, but I found they did not.

Q. Did you try to sell them?

A. On September seventh?

Q. Yes.

A. As soon as this car got into Chicago we tried to sell them, yes. [169½]

Q. Didn't you know it was your duty to take those goods, if you found they were damaged, and dispose of them and minimize the loss as much as possible?

A. It was impossible to dispose of that; that is what I was trying to do. I had them sent to Chicago, sent to my customers, and they turned them down.

Q. Did you do anything with these 398 barrels?

A. I could not. This is a sample of those. It was then about 498. A Sample is what we go by and we could do nothing with them.

Q. Did you try to do anything with those 398 barrels?

(Testimony of H. A. Baker.)

A. Why should I, when I could not sell those one hundred out of the same lot?

Q. Isn't it a fact, Mr. Baker, after this September seventh, or some time along there, you came and saw Mr. Reid and wanted him to sign some kind of an agreement by which he would be willing that you should send those goods to Chicago to be sold, provided he, Reid, would make up whatever there was lost between the price of sale and the seventeen and a half cents? Did you try to get him to sign a contract of that kind? A. Yes.

Q. You tried to get him to do that? A. Yes.

Q. Now, didn't Mr. Reid answer this letter of September seventh?

A. I think he did; I am not sure whether we have it here with us or not.

Mr. BOOTHE.—I would like to have counsel—they have had notice—produce the letter dated September 10, 1920; also one of August 9, 1920.

Mr. SPENCER.—I haven't got that letter of August 9.

Mr. BOOTHE.—And September 16.

Mr. SPENCER.—Let me see your copy of that letter of [170] August 9. I haven't that. I haven't a copy of that.

Mr. BOOTHE.—Have you of September sixteenth?

Mr. SPENCER.—Yes.

Q. I will ask you if you received this letter from the defendants?

A. September 10, 1920? I think so, yes.

(Testimony of H. A. Baker.)

Q. And this one of September 16th?

A. I think so, yes, sir.

(Letter of September 10, 1920, received in evidence and marked Defendant's Exhibit "B.")

(Letter of September 16, 1920, received in evidence and marked Defendant's Exhibit "C.")

Mr. BOOTHE.—Letter of September 10, addressed to H. A. Baker, 322 Tacoma Building, Tacoma, Washington. (Reads as follows:) In reply to your letter of the 7th instant regarding loss on loganberries, we wish to state that we cannot agree to assume all the loss due to fermentation as proposed by you, for the reason that many of the barrels were in bad condition when received by us; in many instances a number of barrels blew before we could get them unloaded from trucks and transferred to the basement. Many of the barrels were filled too full and the hot temperature of the outside atmosphere caused gas to form thereby resulting in distressed barrels. The fermentation started before going into cold storage. Therefore it would be impossible for us to ascertain just what amount of loss was due to our letting temperature get above freezing point for a few days. We will admit that at the time you inspected the goods the temperature was higher than it should have been and that the barrels showed fermentation but we at once reduced the temperature to 26 degrees and we have held it at this or colder which has stopped fermentation and they now seem to be in good condition. The temperature is now 24 degrees and

(Testimony of H. A. Baker.)

the barrels are now ready for shipment, and as per your order for Chicago, a car has been ordered and [171] we are assured the spotting of this car for loading on Saturday the 11th inst. As soon as we know definitely, we will wire Mr. Van Doran. We are willing and want to be fair towards adjusting any loss that we are responsible for but cannot accede to your demand to assume all the loss due to fermentation. The depreciation to contents of barrels will not amount to much as they were frozen most of the time except for a day or two.

The balance of this letter is about something else. The letter of September 16th, addressed to H. A. Baker. Both of these letters are signed by the National Cold-Storage & Ice Company. (Reads letter of September 16, 1920, as follows:) Yours of the 11th inst. to hand and in answer thereto we wish to say that we cannot assume the loss as mentioned in your letters of September 7th and 11th. We have fully explained our position in our letter of the 10th to the effect that we are willing and want to be fair toward adjusting any loss that we are responsible for. You say that this can only be done by our assuring you that we will assume the loss. This would harmonize matters entirely in your favor but not for us. The proper time for adjustment will be after said goods are disposed of, when the actual loss can be determined and at that time we will take up the matter of adjusting any loss that you claim to have sustained on account of our not

(Testimony of H. A. Baker.)

properly handling the goods while in storage. Loganberries are a very difficult commodity to handle and when the barrels were received at our plant, a great many were blowing and bursting, others were fermenting and heads of barrels bulging, so nail holes were made to relieve the gas pressure but notations were not made on the receipts at the time and we do not wish you to assume that all barrels were received in good condition. Car containing 40 barrels strawberries and 60 barrels loganberries left on the 14th of September for Minnesota Transfer. Mr. Van Doren was here and checked same finding all the barrels in good condition. Have been unable [172] to get car for Chicago but expect car by to-morrow. We will wire Mr. Van Doren as requested.

Mr. BOOTHE.—May I read a copy of the letter you cannot produce?

Mr. SPENCER.—Yes.

Mr. BOOTHE.—No objection to this letter and I will ask to have it marked as an exhibit.

(Copy of letter of August 9, 1920, received in evidence and marked Defendant's Exhibit "D.")

Mr. BOOTHE.—Reading from copy of letter of August 9, 1920, written by the National Cold-Storage and Ice Company to H. A. Baker, Salem, Oregon. "We have on hand now about 50 bbls. that have blowed and as we have orders to ship these out we suggest that you send your men here to re-cooper and put them in shape for shipping. Out of the

(Testimony of H. A. Baker.)

last 31 received here, 11 have blowed and 1 that came in last night was a total loss."

Q. Now, it was after receipt of this letter—do you remember receiving this letter?

A. I don't remember receiving it. We have no copy of it.

Q. It was right after that you sent Van Doren?

A. No, not until after we received the letter about the fifteenth.

Q. It was right after this notification you sent Van Doren and Mr. Ireland down to the plant to re-cooper those barrels, was it not?

A. Yes, a few days afterwards, but I think it was not in response to that letter, it was in response to the telegram.

Q. Is Mr. Van Doren entitled to receive your mail at Salem? A. Yes.

Q. And the probabilities are he must have received this letter, as they came down and attended to re-coopering these barrels right away.

A. No, he didn't until he got the wire from them.

Q. Now, going back again to this question of trying to adjust this [173] loss, isn't it a fact—

Mr. SPENCER.—Is that copy of that letter in evidence? A. Yes.

Mr. SPENCER.—It was not identified.

Mr. BOOTHE.—I thought you admitted it might go in.

Mr. SPENCER.—That is why I asked you.

Q. I will ask you if you remember receiving that.

(Testimony of H. A. Baker.)

(Referring to a letter of August 9th previously marked Defendant's Exhibit "D.")

A. No, I don't remember receiving that.

Mr. BOOTHE.—I offer it for identification.

(Letter of August 9th, above referred to, marked Defendant's Exhibit "D" for Identification.)

A. This I see was sent to H. A. Baker at Salem.

Q. Yes.

A. Usually when it is sent to me personally it was forwarded to me at Tacoma at that time. However, I don't remember it.

Q. Now, you have related something about your seeing young Mr. Reid at the plant there about the sixteenth of August, at the time you say there was such fermentation that you were made sick as to the result. Now, following it, isn't it a fact that even after writing these letters to the defendants, trying to get them to acknowledge liability, isn't it a fact you got up an agreement and asked them to sign it—tried to get them to sign it, whereby you were to ship these goods to Chicago and they guaranteed that they would bring seventeen and a half cents a pound? Didn't you try to do that?

A. No, you changed it a little.

Q. What did you try to do?

A. We wanted them to agree to indemnify us between the price and what they cost us. We figured the cost at that time was sixteen cents, and we thought they should, no matter whether we got anything out of them or not. In fact, they did agree

(Testimony of H. A. Baker.)

to do it and then when you stepped into the matter you stopped them.

Q. Yes, we had a meeting at the Benson Hotel, did we not?

A. Yes, and before you came there, down at the plant, they agreed to indemnify us. [174]

Q. They agreed to? A. Yes, sir.

Q. You testify they agreed to? A. Yes, sir.

Q. Why didn't they sign it then?

A. At the last moment they decided to get your advice.

Q. Then they hadn't agreed to it?

A. They did, yes, but you didn't agree to it.

Q. Now, then, at that conversation we had at the Benson Hotel, Mr. Reid, Senior, was present, wasn't he? A. Yes, sir.

Q. This gentleman here was present?

A. Yes, sir.

Q. Van Kesler? A. Yes, sir.

Q. He was there? A. Yes, sir.

Q. Now, didn't Mr. Reid state to you, after we had discussed that matter, Mr. Baker, "If I have damaged your goods any, tell me how much it is and then I will see whether I will pay it?"

A. I think after he saw you he did, up at the Benson Hotel, yes, sir.

Q. That was the final thing that was done?

A. I think he said that at first at the plant, but afterwards I think his son talked him into the other agreement as the best way to handle it then.

Q. When he demanded from you at that time to

(Testimony of H. A. Baker.)

know what you would ask for damages, did you not say, "Mr. Reid, I cannot tell you"?

A. Absolutely I could not have done it, I could not tell what it was.

Q. Then what were you after him for, for damages, if you didn't know what you were damaged?

A. Because the contract covered that. I didn't make a stated amount [175] in the contract, it was covered by my losses and damages. We didn't make a stated amount.

Q. You were driving them into a hole where they would make your losses absolutely safe?

A. Because of the way they handled those goods.

Q. And did they not tell you at that time that those goods when they came into the warehouse were in a damaged condition?

A. Your warehouse receipts show there was only about eleven in bad condition and I saw, when I was there on the first of August—there had been about thirteen hundred barrels, I think, through the cold-storage, these what we were shipping and what were there then and I saw them and knew they were in good condition on that date.

Q. Can you say what was the value of those goods on the thirty-first of July?

A. What was the value of them?

Q. Yes.

A. Seventeen and a half cents a pound.

Q. Can you say what was the value of them on the sixteenth day of August?

A. No, not after they had been through that. I

(Testimony of H. A. Baker.)

thought they were worth more than they were, but later I found out they were worthless. A lot of them at that time I thought they were worth something.

Q. After you had examined these goods, after you had seen them after they were damaged, you didn't make any effort to dispose of them?

A. You bet we did. Ask Mr. Van Kesler, he will tell you how much effort we made to dispose of them. They would not let us ship them out.

Q. You took it they were worthless simply because your chemist told you they were worthless?

A. The chemist didn't come into it until long after we had decided. He didn't come into it until in October, 1921, and we had been trying [176] all this time to sell this stuff back in Chicago.

Q. Mr. Baker, did you receive from the National a statement of the amount—

A. Not after November, 1920.

Q. When?

A. November, 1920, they stopped. We didn't receive any after that. When this discussion came up they didn't forward us any statements after that.

Q. Did you pay the storage on these goods?

A. No, I naturally would not, in this condition.

Q. You say so in your complaint, don't you? Don't you say in your complaint you paid the storage?

A. I don't think so; if so it is an error.

(Testimony of H. A. Baker.)

Q. I call your attention to the allegation in the complaint here—

A. Take that up with Mr. Spencer.

Q. Paragraph V—

Mr. SPENCER.—Blame it on his lawyer. I verified the complaint in the absence of Mr. Baker.

Q. I will ask you whether it is true or not—

Mr. BOOTHE.—We agreed to strike out the word "frozen."

Mr. SPENCER.—I admit it.

Mr. BOOTHE.—Let the record show it is admitted that the charges have not been paid.

A. They have not been paid.

Mr. BOOTHE.—But I want to read the paragraph of the complaint, just the same; as amended by the stipulation the word "frozen" would be left out and the words "state of refrigeration" were to be left out and "proper condition" inserted. So it would read this way now: "That said loganberries when delivered to the defendants were in a proper condition"—I believe that is the way it was, "in proper condition, and the plaintiff has at all times paid all the charges which have [177] been demanded by defendants and has at all times performed all acts and things on his part to be done." Then that is not true, then?

A. You didn't present any statement after November, after this difficulty came up; at least we never received any through the mail at any of our offices.

Q. Well, you never paid anything.

(Testimony of H. A. Baker.)

A. No, we never paid anything.

Q. Do you know how much they claim from you?

A. I think it is a little over five thousand dollars. Of course that is incorrect.

Q. That is correct according to the agreement, wasn't it? A. How.

Q. That would be the correct amount according to the agreement?

A. I don't think so. I haven't gone into that. I would not say so. That includes the 398 barrels you have charged storage on a couple of years.

Redirect Examination.

Q. This question of the rendition of this bill, Mr. Baker, I will hand you a bill dated October 31, on the billhead of the National Cold Storage & Ice Company, and ask you if you recognize that?

A. Yes; it is one we received.

Q. And is that the last bill you have a record of receiving?

A. It is the last statement. We have a few individual invoices about between the first and the tenth of November, and then they stopped altogether.

Q. This is made out as of October 31, 1920?

A. Yes, this is a complete statement up to that date. We never checked that at all.

Q. And during all this time there was a dispute on between yourself and the Reids as to how much they should pay you? [178] A. Yes, sir.

Q. For the berries that had been damaged?

A. Yes, sir.

(Testimony of H. A. Baker.)

Q. Your understanding, as I get it, is that the bill of five thousand dollars which they have set up in their answer includes storage charges on the 398 barrels down, I believe, to the filing of the complaint in this action? A. I think so.

Mr. SPENCER.—I will offer this statement in evidence as the statement of charges down to November 1, 1920.

A. Everything was out of storage, of course, except the 398 barrels at that time, and that includes the storage on the 398 barrels that were still there.

(Statement received in evidence and marked Plaintiff's Exhibit 6.)

Q. I think you have covered the situation as to what you did toward trying to salvage or sell this stuff in the east. How much effort was made in that respect by you to sell these loganberries?

A. Why, we covered the whole United States through our brokers, C. L. Jones & Company, of Chicago and Boston. They cover all the trade that requires that kind of stuff, through circulars sent out every week, to dispose of these goods—our goods; circularized very thoroughly; then personally. I go east every year in the spring, calling on the trade all over the United States.

Q. Something was said by Mr. Boothe about your shipping this stuff east, that you took the chance on it when you shipped it east. As I understood your testimony in the beginning, you sell your stuff F. O. B. Portland?

(Testimony of H. A. Baker.)

A. F. O. B. Portland, yes, sir, we do now. When I first went into the field we used to sell it, until we got the trade established, we [179] sold it F. O. B. delivery point; that was the first few years, until our customers now recognize it as just as standard as butter or any other commodity, so we make them buy now here, F. O. B. in cold storage at the packing plant, wherever it may be, whether it is California, Washington, Oregon, Louisiana, or wherever it may be.

Q. So that goods F. O. B. Portland you assume no risk on that from the time it leaves Portland?

A. Not on the berries which are sold.

Mr. SPENCER.—I think that is all.

Recross-examination.

Q. I would like permission to introduce one or two more letters, if there is no objection. I find them here.

Mr. SPENCER.—Yes.

Q. I show you letter dated August 25, is it?

A. August 25th.

Q. Purporting to have been written by you to the National Cold Storage & Ice Company, and ask you if you wrote that and signed it?

A. Yes.

Q. And one dated September 11; that is your signature to that letter?

A. Yes, I think so. My signature is on the letter, but—

Q. That is your letter of October 5th? A. Yes.

(Testimony of H. A. Baker.)

(Letter of August 25, 1920, received in evidence, marked Defendant's Exhibit "E," and read as follows:)

"Tacoma, Washington, 322 Tacoma Building, August 25, 1920. National Cold Storage & Ice Company, Portland, Oregon. Gentlemen: Acknowledging your favor of August 24th, beg to advise that the temperature of 27, will, I think, be satisfactory, but be very careful to keep the temperature at least as low as that. As soon as I have an [180] opportunity, I will remove some of the stock. In the meantime, it will be necessary to reweigh all of these barrels as undoubtedly from 5 to 10# has oozed out of each, owing to the fermentation, caused by the high temperature which you allowed to occur. The cancelling of the warehouse receipt is perfectly correct. Yours very truly, H. A. Baker."

(Letter of September 11, 1920, received in evidence, marked Defendant's Exhibit "F" and read as follows:)

"Tacoma, Washington, 322 Tacoma Building. September 11, 1920. The National Ice & Cold Storage Company, Portland, Oregon. Gentlemen: Answering your kind favor of September 10th, beg to advise that I did not expect you to assume any liability for loss from fermentation when barrels were received in bad condition by yourselves. Of course, this would be indicated by the receipts, as you should, and undoubtedly did, indicate on the receipts all barrels that arrived in poor condi-

(Testimony of H. A. Baker.)

tion. That being the case, I wish you would write me a letter that you will assume any loss from fermentation on all loganberries other than those received in bad condition and so indicated on the receipt.

This I must insist upon before moving these loganberries—otherwise, I shall take the matter into court and I fear if the health authorities get hold of it, it will be serious. As it is, I hope to make the claim a comparatively light one. It is rather unfortunate that you shipped any loganberries at a time when the temperature was running from 33 to 36. That is what is now causing trouble in the east, as indicated by the car shipped to Durand & Kasper. However, I am handling the matter there to the best of my ability and for your interest—as I could, if I so desire, throw the whole responsibility upon you. I trust, and expect that you will work in harmony [181] to make this loss as light as possible, and this can only be done by you assuring me that you will assume this loss. This must be done in writing. Kindly attend to this at once.

You may ship one car of loganberries to Durand & Kasper, care of the Western Cold Storage Company, Chicago,—open bill of lading, usual precautions for bracing and icing. Use very, very, very great care to see that this car is in perfect condition, and that the barrels are thoroughly washed, marked and re-plugged, so that there can be no suspicion of trouble. You understand this is abso-

(Testimony of H. A. Baker.)

lutely necessary for the reason that Durand and Kasper are now on the alert for trouble. I am writing J. D. Van Doren that you will wire him when you are ready to load this car out, that he may personally inspect it. This is absolutely necessary. Yours very truly, H. A. Baker."

(Letter of October 5, 1920, received in evidence, marked Defendant's Exhibit "G," and read as follows:)

"Tacoma, Washington, 322 Tacoma Building, Oct. 5, 1920. National Ice & Cold Storage Company, Portland, Oregon. Gentlemen: I wish you would raise the temperature of the room in which our fruits are stored to about 24 or 25. We expect some bursting of the heads in the barrels, which is certainly much more satisfactory than having them leak—as we know when the bursting is caused by expansion that they are frozen."

Mr. BOOTHE.—The balance of the letter is about a warehouse receipt, not necessary to read. Does not pertain to this question. I believe that is all.

Redirect Examination.

Q. Mr. Baker, this last letter has a portion in it here about bursting by expansion. You say "We know when the bursting is caused by expansion that they are frozen." Explain that, will you?

A. What is the date of that?

Q. That is October 5th. [182]

A. On October 5th. That is answer to a statement they had got the temperature down so that it

(Testimony of H. A. Baker.)

would penetrate the barrel. Mr. Boothe has spoken about the barrel being too full. That is true; sometimes the barrels do get a little too full and then when they are frozen, after that, a month or so, they begin to expand, they force the head out through expansion. That would not hurt the fruit; that fruit is good as long as it is thoroughly frozen. It will expand and force the head out. It is an entirely different cause from fermentation. Fermentation is where the expansion is caused by the gas forcing it out. That comes early, when you first put it in, but after it is once frozen and remains cool, below, say, twenty-six, then there is no danger at all. Now, this here, being October 5th, that had become thoroughly frozen and it was better to keep it; clearly there was gas in it, and the more you freeze it with gas in it the more it will expand, and I wanted to prevent that as much as possible.

Q. In your letter of August 25 you said something about the temperature of 27 being satisfactory.

A. I was absolutely up against it. They were up against it. They had promised to sell too much ice and they promised cold storage to me and I was trying to coax them along on assuming this loss on this stuff.

Q. I am coming to that. This question of a settlement. When this condition of the loganberries developed there in the middle of August, and on, and you knew what the temperature had been up to—to what point it had been, what were you endeavor-

(Testimony of H. A. Baker.)

ing to do with respect—first of all, with respect to this product that you had on storage there?

A. I was trying to get the best I could out of it. This was my first experience, I had never had anything like this before. I didn't realize it was absolutely ruined until very much later on; even until, say, into the next spring, I thought it had some value.

Q. Your idea was that you could salvage it out in some way, perhaps? [183]

A. I hoped to.

Q. And in taking up this proposition of settlement with Mr. Reid, what was the result of your conversation with him. Counsel has gone into that.

A. Well, early in the game I thought there was some salvage value, but later on I was practically sure there was no salvage value, but I felt he should sustain the loss and I wanted to get him to state he would and he did verbally.

Q. And finally, as a result of your efforts to salvage the product on the various markets, what were you able to do?

A. Could not do anything. They were turned down. They sent this car back to Chicago, this last car and tried to sell it to different buyers; they would take it up and try it and turn it down; couldn't use it, it was worthless.

Mr. SPENCER.—That is all.

Recross-examination.

Q. Now, that car you have just spoken about

(Testimony of H. A. Baker.)

trying to sell in Chicago wasn't any part of these 398 barrels?

A. It was a part of it. This—that is the part we shipped out; it wasn't 398, but it was 498 at that time.

Q. Then at that time you commenced this action you didn't have 398 barrels there?

A. Yes, we had 398 barrels at the time we started this action, but at the time we made this shipment we had 498. It was the same lot, same condition.

Q. When did you make that shipment?

A. September, I think. The records show. I think it was September some time.

Q. Then you say you had 398 barrels left after that? A. Yes, about that.

Q. How long were those goods on the road to Chicago? [184]

A. Why, I don't remember. Absolutely. Usually they took from nine to twelve days.

Q. Takes about seventeen days, doesn't it?

A. No, sir; takes from nine to twelve days. Anyway, we never have any losses to speak of.

Q. I think when you examine the shipping receipts you will find it took seventeen days. Do you remember when we took depositions in Chicago we figured it out it took seventeen days?

A. I think a car sometimes will take seventeen days, but usually it is from nine to twelve days.

Q. During all the time they are out of the warehouse you don't know what temperature has been maintained by the refrigerator car, do you?

(Testimony of H. A. Baker.)

A. No.

Q. You don't know what has been done to those berries en route?

A. If we have any trouble we can chase it up through the records of the railroad company, to see whether they are properly iced and salted, but from the reason we don't have any trouble we figure they were.

Q. Did you ever enter suits against the railroad companies for goods damaged en route?

A. Do you mean these last or others?

Q. Any of them.

A. Yes, but I think they were directed—

Q. I mean, are you suing any railroad companies?

A. They are suing the railroad companies, but they realize now where the trouble is, I think they have all withdrawn from the railroad part of it.

Q. There is a suit pending now, isn't there?

A. I think not; I think that has been withdrawn, Mr. Boothe.

Q. Isn't suit pending now of McNeil and Hawkins against the railroad company? [185]

A. I just received a letter—I have been receiving two or three letters during the last week, and they are suing you and me, or are going to sue you and me.

Q. How do you find that out now?

A. Through their lawyer, has been writing me the last two or three days.

Q. What lawyers?

(Testimony of H. A. Baker.)

A. Blum, Owens and something—Hudson and Blum, 110 South Dearborn Street, Chicago.

Q. What have they notified you? What have they written you?

A. Why, they wrote us that they had taken depositions out here through a lawyer, in which I think Mr. Reid and Mr. Patton and Mr. Kennedy were accused in the matter and they had come to the decision that the railroad company was not at fault, that it was either against the cold-storage company or myself.

Q. Have you got that letter?

A. No. I have got one letter from them, the last letter I received.

Q. Have they dismissed their case?

A. I would not say; the inference is that they did. I would not say positively. As I said before, I am not sure, but I know they are considering it; at least they wrote me they were.

Mr. BOOTHE.—That is all.

Witness excused.

Testimony of Robert Ireland, for Plaintiff.

ROBERT IRELAND, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Question by Mr. SPENCER.)

Mr. Ireland, what business are you in?

A. Manager of the Terminal Ice and Cold Storage Company. [186]

(Testimony of Robert Ireland.)

Q. Where are you located?

A. Third and Hoyt.

Q. In Portland, Oregon? A. Yes, sir.

Q. How long have you been in the cold-storage business? A. Five years.

Q. And in the city all the time?

A. All the time.

Q. And connected with the Terminal Ice and Cold Storage Company? A. Yes, sir.

Q. And do you handle barreled loganberries?

A. Yes, sir.

Q. Have you stored and handled barreled loganberries for Mr. H. A. Baker? A. I have.

Q. What years?

A. 1918 and 1921. I am handling some for him now.

Q. You are handling some for him now?

A. Yes.

Q. You are connected, are you, with the operating end of your cold-storage plant? A. Yes, sir.

Q. And do you know the degrees of temperature that should be maintained in order to preserve those products? A. I do.

Q. When loganberries are brought to the plant what would you say would be the proper degree of temperature to be given to the berries to protect them and prevent them from deterioration?

A. From zero to fifteen above.

Q. By that do you mean that you first freeze them? A. Yes, freeze them all.

(Testimony of Robert Ireland.)

Q. What do you do about putting them into a separate room or not? [187]

A. Put them into a room and then take them from one room and pile them in a room of twenty-two degrees.

Q. You do what?

A. Freeze them first and put them in a higher room of twenty-two degrees.

Q. And then what do you do as to maintaining that temperature of twenty-two degrees?

A. Well, you keep a thermometer in the room all the time and the man calls every hour to read the thermometer, so that the temperature is kept there constantly.

Q. And do you permit the temperature to rise and fall with any great degree of variation; for example, up to thirty-two or above?

A. No, sir.

Q. What would be the effect on frozen loganberries, refrigerated loganberries, if the temperature was allowed to go to thirty-six degrees and stay there for five or six days?

A. Well, they would thaw out.

Q. Do you charge—you have an initial charge for freezing?

A. Yes, sir, in addition to the storage.

Q. When Mr. Baker stores with you each year does he make a separate contract and give you special directions each year with respect to the temperature to be maintained?

(Testimony of Robert Ireland.)

A. Yes, he always has us keep the temperature down.

Q. I mean, does he talk with you every year when he does his storing with you, about that?

A. No, sir.

Q. How was that handled?

A. Well, I would not take berries in unless I would keep the temperature down, because I know they would not keep?

Q. And what arrangement—was that arrangement made at the beginning of your experience?

A. Yes, we sent out cards to that effect. [188]

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Mr. Ireland, supposing the berries had been frozen, well, frozen, when they were put in there and temperature maintained along, say, twenty-four, twenty-five or twenty-six there, and then suppose the berries were in good condition—suppose they came in there in good condition and you should let that temperature change around a little from thirty-two, thirty-three, thirty-four, thirty-five and maybe to thirty-six a day and then put it right back down again, do you think there should be any damage to those goods?

A. Well, if held any length of time there would be.

Q. Yes; but suppose, then, Mr. Ireland, some of those goods were not in good condition and some

(Testimony of Robert Ireland.)

even in fermented condition when they were put in and this temperature goes up and those that were in good condition did not ferment at all but the others that had formerly fermented began to ferment again, would you say if they had been in good condition they also would have kept along with the good ones?

A. Well, that is a pretty hard thing to say; I don't know whether they would or not.

Q. It would be reasonable to suppose that they would, wouldn't it?

A. You mean that they would keep?

Q. That they would keep if they were in good condition and had been in good condition all the time?

A. Well, a loganberry, as a rule it ferments very quickly and I could not state as to the time it would take for them to ferment again.

Q. Have you ever had any of those loganberries brought to your plant in a fermenting condition?

A. I have, yes, sir. [189]

Q. What do you do with them when they do that?

A. Well, we would attend to them and put them right in the freezer.

Q. Do you consider they are damaged when they are fermenting?

A. Well, of course they are not so good, but we have never had any trouble with them.

Q. After you freeze them and keep them frozen right along they sell—they are all right, are they?

(Testimony of Robert Ireland.)

A. They are always taken out. We never had any claims to make.

Q. Never had any barrels burst, blow up on you?

A. Yes, we have barrels come in that are too full and the freezing will break the head out of the barrel.

Q. I mean when they are brought to the plant, if you had any brought there in such a warm temperature that they blew up before you could get them in? A. Yes, sir, I have.

Q. Then you have had a similar condition to what has been related here, goods have been brought to the plant in a fermenting condition and are put in and frozen? A. Yes.

Q. And you have had occasion, where they had begun to ferment again after they were frozen?

A. No, sir.

Q. Keep them frozen all the time?

A. Yes, sir.

Q. When you freeze a barrel it swells the head and they burst?

A. Yes, if the barrel is too full. There is a certain expansion, which ought to be about six inches on the top of the barrel for expansion, and if the barrels are too full it will break the—

Q. Now, Mr. Ireland, suppose in this case of the defendants here that some of those berries had been brought there in barrels in a [190] fermenting condition, so that you could hear them sizzling, for instance, and then suppose they afterwards, after they had been frozen, began to ferment again for

(Testimony of Robert Ireland.)

a few days. Now, where is the damage? Which is the damage, the first or the last fermentation?

A. Well, I could not say.

Q. You could not say. You could not say how much damage there was to the first fermentation then, could you? A. No, I could not, Mr. Boothe.

Q. And could you say how much damage there was to the berries by the second fermentation?

A. No.

Q. Could you say, then, they were damaged any substantial amount?

A. Well, I don't know as I could, no.

Q. But in your instances they have gone through and been sold and nothing said?

A. Yes, sir, as long as you keep them frozen, why they go through.

Q. Do you know anything about the value of loganberries in July and August, 1920? A. 1920?

Mr. SPENCER.—I didn't ask the witness anything about that.

Mr. BOOTHE.—I will pass it then, I will not ask it.

That is all.

Redirect Examination.

Q. Mr. Ireland, speaking of the receipt of barrels which might be called in bad order, what is the practice as to noting that on the receipts issued by your company?

A. Well, if the barrel comes in in a leaking condition or fermenting at all, we mark it in bad order on the receiving slip.

(Testimony of Robert Ireland.)

Q. A barrel may come in leaking and yet not be fermenting, isn't that true? A. Yes.

Q. Maybe something happened to it in the handling it to have broken the head, something of that kind, and be absolutely free from fermentation? [191]

A. Well, we have had that.

Q. Now, what is the effect of moving into a cold-storage room where barrels are stored—moving into that room new barrels that just came from the outside, haven't been under refrigeration; what is the effect? A. Well, we have to—

Q. I mean as to the temperature of the room.

A. It will raise the temperature of the room.

Q. Now, you have said that you had some barrels at times in your plant that showed distress; that is a condition of affairs that to some degree is bound to occur?

A. It is very general, in some cases, with loganberries.

Q. Now, however, the condition which you have described in your plant, did you ever have present there a state of temperature running up to thirty-six degrees and staying around there for four or five or six days? A. No, sir.

Q. And the loganberries subjected to that state of affairs? A. No, sir.

Mr. SPENCER.—That is all.

Recross-examination.

Q. Now, about those, did you ever have any of

(Testimony of Robert Ireland.)

those barrels come in and bursting in your plant as they came in? A. Yes, sir.

Q. What about that?

A. Well, they are received in that condition.

Q. Did one of those barrels blow up and injure a man one day in your plant?

A. Yes, sir. [192]

Q. Pretty nearly killed him, didn't it?

A. Yes, sir.

Q. Weren't there berries scattered all over your floor at times? A. Yes, sir.

Q. They come in usually in pretty bad condition, don't they?

A. Well, there is times that they would come in bad condition, but we always mark the receipt that way, and say that is the condition they came in.

Q. Mr. Ireland, suppose those barrels, fifty gallon barrels, I believe they were, were shipped in from Salem by truck, fifty-two miles away, solid tire truck, hauled to Portland all that distance in three hours and a half to four hours, is that hauling them pretty fast for their good?

A. Well, if the berries are in good condition when put up they come through in pretty good shape; sometimes they ferment.

Q. Wouldn't that have a tendency to churn them up and make them ferment?

A. I don't know as it is that that does it. It is the heat, the temperature of the day outside, putting

(Testimony of Robert Ireland.)

the berries in the hot barrel, the hot barrel starts fermentation.

Q. That has a good deal to do with it, but churning assists also, does it not? A. It might, yes.

Mr. BOOTHE.—I think that is all.

Redirect Examination.

Q. Mr. Ireland, you have spoken about receiving bad order goods, loganberries; you handled goods for Mr. Baker, in 1918? A. Yes, sir.

Q. Do you know where they came from?

A. They came from Salem.

Q. And how they got down to your plant in 1918? [193]

A. Well, they came by truck. Let's see, now. I don't know. 1918. I think some came by truck and some by express and some by freight, in cars.

Q. And you handled goods for him, loganberries —barreled loganberries—in 1921? A. Yes, sir.

Q. How did they come down to your plant?

A. They came by truck.

Q. By truck? A. Yes, sir.

Q. And what has been your experience as to the handling of loganberries by truck as compared with train?

A. Well, we like to handle them by truck better than we do by train.

Q. Why is that?

A. Well, they come in quicker; we get them quicker.

Q. You get them quicker? A. Yes, sir.

(Testimony of Robert Ireland.)

Q. And these loganberries you handled for Mr. Baker in 1918 and 1921, did you experience any particular difficulty as to blowing and sizzling and so on, with them?

A. We had a few barrels, yes; lose a few barrels.

Q. By a few, in a season how many do you mean?

A. Well, I think we handled something like a thousand, fifteen hundred barrels for them. We had twenty or thirty of those.

Q. Out of a thousand or fifteen hundred twenty or thirty? A. Something like that, yes.

Q. You haven't the exact figures before you?

A. No, I haven't; I could not say.

Mr. SPENCER.—That is all.

Witness excused. [194]

Testimony of Harry E. Larson, for Plaintiff.

HARRY E. LARSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Larson, where do you live?

A. Seattle, Washington.

Q. And what is your business?

A. I am agent in charge of the Spokane Street Terminal.

COURT.—Spokane Street Terminal?

A. Which includes the cold storage, ice and fish plants.

Q. And what is that? Is that a municipal plant?

(Testimony of Harry E. Larson.)

A. Yes, sir.

Q. Of the City of Seattle?

A. Of the Port, District of King County.

Q. Of the Port, District of King County. And how much experience have you had in handling cold-storage plants?

A. About twelve years. Seven years with the Port of Seattle, and several years back east; four or five years back east.

Q. The business that you handle in the Port of Seattle, does that include the receiving and storing of fruits?

A. We handle fruit for about—to twenty thousand barrels of loganberries, strawberries and raspberries each season.

Q. How is that fruit packed, or where is it packed?

A. Why, some of it is packed in Sumner, Puyallup, Vashon Island, Bainbridge Island, and some of it at our plant.

Q. Some of it at your plant? A. Yes.

Q. Now, take the fruit that is brought in and packed at your plant, what distance would it be brought in from?

A. Well, most of that is brought in by boat and by truck direct from the [195] fields. It is picked one day and brought in during the night and packed in barrels the following day and put into the cold-storage plant.

Q. Put into the cold-storage plant the second day after it is picked?

(Testimony of Harry E. Larson.)

A. The second day after it is picked.

Q. And do you know of the distances that it may be trucked in from?

A. Why, the longest distances probably would be about thirty-five miles.

Q. And you are speaking now of berries that are picked and trucked in before they are packed, are you?

A. Well, that would be including the barreled berries.

Q. I see. That is the longest distance, about thirty-five miles? A. About thirty-five miles.

Q. Those trucks that bring in the berries there to your plant, are they covered trucks or uncovered trucks, or how are they?

A. Some are covered and some are uncovered.

Q. Some of the berries are exposed to the sun as they are trucked in?

A. Yes, there are some barreled berries come in there without anything on them, any awnings on the trucks.

Mr. BOOTHE.—If the Court please, I object to testimony about what they do over in Seattle. What we do in Portland is what we want to find out about. What he knows about this business I don't object to, but over in Seattle has nothing to do in this case, unless directed to proving custom, and there is no custom alleged here.

Mr. SPENCER.—I am merely qualifying the witness as to his experience he has had. I am through with that.

(Testimony of Harry E. Larson.)

Mr. BOOTHE.—Is that all you want to show, the experience?

Mr. SPENCER.—Yes, as to handling it.

Q. Now, Mr. Larson, what, in your experience in the handling and operating of a cold-storage plant, is the necessary temperature in order [196] to preserve fruits like loganberries from fermentation and spoiling?

A. My experience shows that the heat must be taken out of the berry by putting in cold storage at a low temperature for anywhere from three to ten days. We carry them as low as five above zero. Then the temperature is later raised not to exceed twenty-five degrees.

Q. What would be the effect upon loganberries if the temperature was allowed to go to thirty-six degrees and remain around that point for four or five or six days?

A. If the berry had been properly cooled in the first place it would take a number of days for the temperature to get up to thirty-six degrees, even though the refrigeration in the room was cut off entirely. The fact that the volume of goods in the room, with a well-insulated room, would refrigerate the room for a certain length of time. It would be a slow process before it would go up to thirty-seven degrees. As a matter of fact the goods would have to gradually thaw out until it got that temperature.

Q. But if they had not been properly frozen at the outset, and adding to that the proposition of moving in new berries from the outside day by day

(Testimony of Harry E. Larson.)

and the temperature were permitted to go to thirty-six and remain for four or five days, what would be the effect on the berries?

A. There would be a slow process of fermentation and the higher the temperature the quicker the process would be.

Q. What is the practice in operating cold-storage plants as to noting on the receipts when the goods are received as to any bad order barrels?

A. There is a notation put on all warehouse receipts as to the condition of the barrels. It may be staves, they may be head broken,—a head may be broken while the contents may be O. K. If the contents are in bad order such a notation should be made on the warehouse receipt. [197]

Q. Mr. Larson, what have you to say as to the extent of the business of dealing in barreled goods, that is, packed in barrels and placed in cold-storage plants and then shipping to various points by refrigerator-cars?

A. It is now one of the largest industries on the Pacific Coast.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Suppose, Mr. Larson, that the goods came to the cold-storage plant in a fermenting condition, such a condition that sometimes a barrel blowed up, and they are put into the freezer and frozen. Now, what effect does the freezing have on them?

A. Retards fermentation.

(Testimony of Harry E. Larson.)

Q. Just holds them there, does it?

A. It holds them; won't cure it.

Q. And if they are fermented when they come in there are they ruined?

A. No; they would not be as good as if they were fresh and not fermented. There would be a small amount of damage there. It all depends upon the amount of fermentation when those are sent in.

Q. Those can be freshened up, you said?

A. No, they cannot be freshened up after they once ferment.

Q. How is that?

A. No, they cannot be freshened up after they are once fermented; they cannot be freshened up after they are once fermented.

Q. Are they ruined?

A. They may not be ruined; it might be a slow fermentation and still they would not be ruined.

Q. They would be marketable goods, yet would they?

A. Marketable goods; they would not be first-class goods. There would be a certain amount of deterioration.

Q. That is what I am getting at. Then you would not say that because they fermented that they were ruined—absolutely ruined? [198]

A. All depends upon the amount of fermentation. If full fermentation has set in they are practically ruined; if there is only slight fermentation they would still have a market value.

Q. If they came into the cold-storage plant in a

(Testimony of Harry E. Larson.)

fermenting condition and by some reason or other the temperature went up and they began to ferment again, could you tell which fermentation caused the damage, or whether one fermentation caused more damage than the other?

A. The first fermentation would cause a certain amount of damage and the second one would increase it.

Q. It would increase it. Now, then, could you tell in such an intelligent way that the jury could fix the damages if it was stated to you *that came* into the cold-storage plant in a fermenting condition and then while so—that is, so that the barrels could be heard sizzling, and then after they were frozen they began to ferment again, can you tell, supposing that the cold-storage plant were liable for that second fermentation, can you tell how much the damages would be?

A. No, I would say that if the barrels came in fermenting, the cold-storage plant had a notation on the warehouse receipt to cover that, they would not be responsible, practically in no degree.

Q. They would not be responsible for any damages if they fermented again?

A. If it was covered by notation on the warehouse receipt.

Q. Suppose they were not on the warehouse receipt, but the owner of the goods were notified, that would be the same thing?

A. After he has got his warehouse receipt an additional notification would be worthless.

(Testimony of Harry E. Larson.)

Q. Well, a warehouse receipt, negotiable warehouse receipt going into the hands of a third party, that might have some effect on it, but so long as the owner of the goods holds the warehouse receipt and he is notified that those goods were fermenting when they came in there, he has knowledge of the fact and that would not make any difference, then, whether noted on the warehouse receipt or not, would it? [199] A. Yes, it would.

Q. Why would it make any difference?

A. Well, it may be neglect of the plant.

Q. I know. You don't get my question. Maybe I don't make myself clear. Goods coming in at night, different times, we will say. A. Yes.

Q. Night watchman received them. They are dumped off on the platform there, he gives a receipt for so many barrels, he does not know whether they are all good or not, but after they have gone away and cooled down and things settle down a little bit, things stop, he hears sizzling and he notifies the owner of the goods that some of those goods that came in there were fermenting when they came in there. He receipted for so many barrels without saying anything about the condition, we will say, but he notified the owner of those goods they were in a fermenting condition when they were delivered there; does that protect the warehouse plat?

A. If he notified them the same day or following morning I would say it holds good, but the cold-storage plant that is paid for expert service should

(Testimony of Harry E. Larson.)

not leave a night watchman to receive goods of a perishable character. They should leave somebody in charge for receiving goods at night that could give an intelligent receipt.

Q. Do you receive them at night over there?

A. Oh, yes, we leave a man in charge at nights during the berry season that is qualified to examine the goods.

Q. Receive that at all times, night and day?

A. At all times. It is necessary during the berry season; it is only a short time of one month or six weeks, and during that period we do.

Q. Have you ever had any of those loganberries come into your place in a fermenting condition.

A. Get barrels; get quite a few; every once in a while get barrels. There are several ways that may be caused.

Q. Barrels ever blow up on you?

A. We have had a few. I will show you how that may be caused? [200] In the fields, the berry fields, the berries are picked during the day; the truck comes along and picks them up at a certain time, maybe in the evening and after they get through picking, and pickers may go out and work until dark and pick an additional lot of crates. Now, those crates are carried over until the next day and would be shipped to the plant and there would be a small amount of berries there that had been picked the day previous, which would be in poorer condition than the berries that were picked during the current day and it would account

(Testimony of Harry E. Larson.)

for a few berries being in poorer condition than the balance.

Q. Now, is it a proper thing, in putting those berries into barrels, to mash them down or mash them up or pulp them.

A. On our terminal there we are packing at the present time about ten thousand barrels of strawberries; we take a big pole and stick it down into the barrel and jam them around, stir them around, in order to get them to work their way down and fill the barrel completely, and then there are more berries poured in.

Q. Mash them up then? A. Mash them up.

Q. Is that likely to cause them to ferment any quicker?

A. No, it doesn't; we have wonderful success with the handling of them.

Q. Then, if they are hauled by trucks over a rough road any distance, would that cause them to ferment?

A. Well, if it is hauled in the sun it would not do them any good. As far as the shaking of the barrel, I don't think it would have anything to do with it at all. If they were left out, exposed to the sun any great length of time, there would be a certain amount of heat added to the barrel which would have to be taken out after the goods were put in storage.

Mr. BOOTHE.—That is all.

(Testimony of Harry E. Larson.)

Redirect Examination. [201]

Q. Mr. Larson, as I understand it, berries that are completely fermented, are they or are they not ruined? A. They are absolutely ruined.

Q. And is the permitting of the temperature of a cold-storage room to go to thirty-six and stay there four or five days apt to completely ferment berries which have not been frozen down to the degree that you have mentioned?

A. It would be very likely to.

Mr. SPENCER.—That is all.

Recross-examination.

Q. Now, what do you mean by completely fermented?

A. Be fermented to such a degree that they would not be fit for human consumption. Just the same thing, might take a bowl of strawberries at home and a certain amount of fermentation set in and while it was so that you could not eat it, but if you left it set around a long time it would get so sour you would not care to eat it, it would not be fit for consumption.

Q. Now, if these barrels of berries came to the cold-storage plant in a fermenting condition, so that you could hear them sizzling, would you say that they were destroyed?

A. Not necessarily destroyed, but you could ascertain the amount of damage done by tasting them.

Q. Then if they were frozen they would be merely held, as I understand you, in their condition?

(Testimony of Harry E. Larson.)

A. They would be in the same condition after they were frozen as they are before. You would still have that fermentation in that particular barrel; it would still be there. Just the same with a fish that is partly spoiled and freeze it up, you cannot bring back its original state.

Q. How long would it take to freeze those barrels through they [202] had fermented?

A. After they had fermented it takes about—well, it doesn't make any difference whether they are fermented or not.

Q. I didn't catch you.

A. It doesn't make any difference whether they are fermented or not fermented; there is so much heat that had to be extracted from that barrel to bring it down to a frozen condition.

Q. How long would it take to do that?

A. It would take ten days to two weeks.

Q. Well, during the time you are freezing them, when they come in fermenting, during the time you are freezing them or reducing that heat, they are still fermenting, are they not, until they get so cold?

A. No, not necessarily fermenting. You take the heat out of them and you have stopped the fermentation.

Q. Well, take a barrel in a fermenting condition, put it into a freezer, how long will it continue to ferment until it stops?

A. Well, it would slightly ferment until the majority of the heat is brought out of the barrel.

(Testimony of Harry E. Larson.)

Q. You don't know how long that would be?

Q. Well, it would require a technical examination to bring that out.

Q. In any event there would be some fermentation going on in the berries until they are chilled?

A. Yes, sir.

Witness excused.

Mr. SPENCER.—I would like to read two depositions, your Honor, now. I think the stipulation is attached to the original; anyway there is no question about it. I will omit the stipulations and the preliminary things. I suppose I may take the witness-stand here? [203]

COURT.—Yes.

Mr. SPENCER.—Will it be agreeable if I read the questions and answer?

Mr. BOOTHE.—We stipulate that any objections might be taken at the trial?

Mr. SPENCER.—I will keep my eye on you and if you want to object—

Mr. BOOTHE.—Yes, you watch me, now.

Mr. SPENCER.—I will do that. These are two depositions, gentlemen, taken in Chicago on behalf of the plaintiff, in which Mr. Eley represented Mr. Baker and Mr. Boothe was back there representing the defendants. (Reads deposition.)

Deposition of Matthew H. Theis, for Plaintiff.

"MATTHEW H. THEIS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

(Deposition of Matthew H. Theis.)

Direct Examination.

"(By Mr. ELEY.)

"Q. What is your name?

"A. Matthew H. Theis.

"Q. Where do you live, Mr. Theis?

"A. 4204 North Lincoln Street, Chicago, Illinois.

"Q. How old are you, Mr. Theis?

"A. Thirty-six years.

"Q. What is your business?

"A. Buyer for John Sexton & Company, wholesale grocers.

'Q. Where are John Sexton & Company located?

"A. 352 West Illinois Street, Chicago, Illinois.

"Q. Their business is what?

"A. Wholesale groceries.

"Q. How long have you been associated with or employed by John Sexton & Company?

"A. Since 1903.

"Q. What are your specific duties at the present time? [204]

"A. I have a varied line of goods to buy, as well as charge of the manufacturing of numerous articles, like jams, jellies, preserves, pickles, the packing of olives and ketchup, and quite a few other lines.

"Q. Is that manufacturing business carried on in Chicago?

"A. Yes, sir, at 352 West Illinois Street.

"Q. And you have direct charge and supervision of that, have you? A. Yes, sir.

"Q. Well, now, have you had any experience in

(Deposition of Matthew H. Theis.)

handling fruit such as strawberries, loganberries, raspberries and such things, packed in barrels or containers in what is known as cold pack?

"A. Yes.

"Q. Have you ever had any experience in handling loganberries in barrels in what is considered cold pack? A. Yes, sir.

"Q. Over what period of time does your experience extend? A. About eight years.

"Q. You have had experience in preserving, manufacturing preserves from fruits and berries, have you? A. Yes, sir.

"Q. Over what period of time?

"A. About eight years.

"Q. In Chicago? A. In Chicago, yes.

"Q. Have you any experience in the manner of transporting or conveying these fruits from the farm or place where they are grown to the place of packing?

"A. I have knowledge of the way they are transported.

"Q. Well, do you know how they are transported? A. Yes, I do, yes.

"Q. Where do most of the fruits that you pack, such as loganberries, strawberries and raspberries come from, Mr. Theis?"

Mr. BOOTHE.—That I object to, your Honor; that has nothing to do with this case; that is Illinois.

COURT.—The loganberries came from the Northwest? [205]

(Deposition of Matthew H. Theis.)

Mr. SPENCER.—Yes, he says from the Northwest.

COURT.—Go ahead.

Mr. SPENCER.—(Continues reading deposition:)

"Well, the loganberries come from the Northwest; the strawberries come from Michigan, Tennessee, Louisiana, California and Washington.

"Q. Well, are those berries, such as loganberries, strawberries and raspberries, shipped to you for your manufacturing in what is known as refrigeration conveyance, or are they shipped just as they are taken from the field or bushes?

"A. Well, speaking of barrel goods now?

"Q. Yes, barrel goods.

"A. They are shipped in refrigerator-cars.

"Q. Well, have you had any experience in getting them from the field in boxes or packages as they are taken right from the field?

"A. Yes, we have quite often.

"Q. How long does it usually take to transport them from the field to the factory, to your factory for instance?"

Mr. BOOTHE.—That I object to.

COURT.—I suppose it is qualifying him as an expert.

Mr. SPENCER.—That is the intention.

Mr. BOOTHE.—Oh, he is qualifying him as an expert now. All right.

Mr. SPENCER.—I think that is the object of it.

COURT.—Go ahead.

(Deposition of Matthew H. Theis.)

Mr. SPENCER.—(Continues reading deposition:)

"A. About two days, forty-eight hours.

"Q. Where from does it take two days?

"A. Well, from Michigan for instance.

"Q. In your experience, Mr. Theis, have you ever had any trouble with fruit spoiling such as raspberries and strawberries, where they are [206] shipped from the field to your factory, not in cold-storage containers?

"A. No, I have not, not after they arrived; some they have carried as long as three days and we have not had any trouble, but beyond that, why, there is a softness.

"Q. They might or might not be in good condition? A. Yes.

"Q. When berries are shipped from Michigan how are they usually shipped? A. By boat.

"Q. Well, what kind of containers are they usually? A. In wood cases.

"Q. Do you ever get any in barrels in what is called cold pack?

"A. Yes, we have had some in barrels, we have had cold pack shipped from Michigan over here on boats without any refrigeration.

"Q. Are they usually shipped, Mr. Theis, in refrigerator-cars or are they not?

"A. From Michigan?

"Q. Yes. A. No, they are not.

"Q. What is the shortest time, Mr. Theis, that fruit can be shipped from Michigan to Chicago?

"A. Well, from the time you ship it, you mean

(Deposition of Matthew H. Theis.)

from the time it leaves the field or from the time it leaves the dock?

"Q. From the time it is picked, for instance?

"A. Well, it takes two days before they get it in cold storage.

"Q. Have you had any trouble in your experience in handling fruit that is received by you here two days from the time of picking? A. No.

"Q. Now, Mr. Theis, have you had any experience in handling cold pack fruit, particularly loganberries, in cold storage? A. Yes, sir. [207]

"Q. Over a period of how many years have you had experience in that?

"A. The same number of years, about eight years.

"Q. Do you or do you not use loganberries every year? A. We do every year.

"Q. Where are loganberries grown, if you know?

"A. Well, they are grown in different sections, I could not just tell you what part of the states, but Oregon I think grows some loganberries.

"Q. Have you ever bought any loganberries, or has your firm ever bought any loganberries from the plaintiff in this case, H. A. Baker?

"A. Yes, sir.

"Q. Did you purchase any, did your firm purchase any loganberries of H. A. Baker during the year 1920? A. Yes, sir.

"Q. How many barrels, or what quantity did you purchase? A. Two hundred barrels."

(Deposition of Matthew H. Theis.)

Mr. BOOTHE.—That is what I object to, your Honor. Is it any part of these berries?

COURT.—Part of the same berries that were in cold storage at the time these were said to be damaged, I suppose.

Mr. SPENCER.—They are.

Mr. BOOTHE.—It does not say so here.

Mr. SPENCER.—(Continues reading deposition:)

"Q. Of loganberries?

"A. Well, we bought—yes, two hundred barrels.

"Q. What price did you pay for those, what was the price?

"A. I have not got the invoices here, I don't recollect just what that was; if I remember right it was around 17½c a pound f. o. b. cold storage.

"Q. That is f. o. b. cold storage Pacific Coast? [208]

"A. No, I can't recollect just what warehouse had them without the warehouse receipt.

"Q. Now, Mr. Theis, you have had berries packed in what you call cold pack, in cold-storage warehouses in the City of Chicago, have you?

"A. Yes, sir.

"Q. Have you any custom or regular requirements for temperature in which such goods shall be kept by the cold-storage companies?

"A. Yes, sir, we have instructions both at our plant and also at the cold-storage houses not to let the temperature get above 26 degrees.

(Deposition of Matthew H. Theis.)

"Q. And in your experience what is the usual and customary temperature at which such fruit is kept by cold-storage companies, Mr. Theis?

"A. Twenty to twenty-six degrees.

"Q. When the fruit is kept stored in a temperature of 26 degrees or less, have you ever experienced any loss of such fruit by fermentation or otherwise? A. No, sir.

"Q. And in your opinion and from your experience as a manufacturer and in the handling of berries, is that a proper temperature at which to keep and store such fruit? A. Yes, sir.

"Q. And in your opinion is that a proper temperature at which to keep loganberries packed in barrels in what is known as cold pack, is that right? A. Yes, sir.

"Q. And in your opinion and from your experience have you ever had any loss of loganberries packed in cold pack when kept in a temperature of 26 degrees or under? A. No, sir. [209]

"Q. Have you ever had any experience with loganberries kept in barrels in what is known as cold pack where the temperature was above 26 degrees?

"A. Well, we never let our temperature get above 26 degrees.

"Q. Have you an opinion as to what would happen to fruit and particularly loganberries packed in barrels in what is known as cold pack, if the temperature was allowed to get above 26 degrees?

"A. Yes, it ferments if it gets above 26 degrees.

(Deposition of Matthew H. Theis.)

"Q. Well, at what temperature above 26 degrees, in your opinion, and from your experience, do you think that they would be subject to fermentation?

"A. Well, after it got around 32 or 35 degrees it would ferment; if it got above 32 degrees they would spoil.

"Q. How can you tell when fermentation occurs in barrels of fruit such as loganberries and strawberries?

"A. Well, the barrels would show signs of distress, like swelling of the heads or bulging of the heads, also leakage on the staves.

"Q. What is that due to, what causes the process of swelling of the heads?

"A. It is gas caused by fermentation.

"Q. Can fermentation occur without forming gas, in your opinion? A. No, it cannot.

"Q. Now, Mr. Theis, you said that you bought, your company bought loganberries of Mr. Baker in 1920. What did you buy them for, what purpose?

"A. For manufacturing high grade preserves and soda fountain fruit.

"Q. Well, if those loganberries started to ferment, or were slightly fermented, could you use them for the purpose for which you purchased them? A. No, sir. [210]

"Q. What can they be used for if anything when the loganberries are fermented?

"A. We could not use them at all in our business.

(Deposition of Matthew H. Theis.)

"Q. Well, what would you do with them?

"A. We would have to try to salvage them.

"Q. Would the pure food law or authorities permit you to use them?

"A. Well, that is a question I can't answer.

"Q. You in your experience do not use them, is that right?

"A. No, we would not use them, and we do not use them if they show any signs of fermentation.

"Q. Now, getting back to this two hundred barrels of loganberries that you purchased of H. A. Baker in 1920, what time in the year did you buy them?

"A. I bought them in the early part of the year on a future contract; I don't quite remember just when.

"Q. What did you buy them for?

"A. For the manufacture of jams and preserves and soda fountain fruit.

"Q. Did you receive all or any part of this two hundred barrels of loganberries from Mr. Baker?

"A. Yes, sir.

"Q. When did you get them?

"A. Well, they were transferred to our account in August some time, I will give you the exact date when I get the invoice; and we ordered them out later, in the month of November.

"Q. 1920? A. 1920.

"Q. What do you mean by ordering them out?

"A. Well, we issued orders to the warehouse to

(Deposition of Matthew H. Theis.)

ship us one hundred barrels of the two hundred that they had there in their place.

"Q. Did they ship them?

"A. They did ship one hundred barrels. [211]

"Q. What warehouse was this order on?

"A. The National Cold Storage and Ice Company.

"Q. Of what city? A. Portland, Oregon.

"Q. And do you know when you received those, or when your company received those goods, this one hundred barrels?

"A. Yes, sir, we received them some time in November. As I say, I will get the exact date when I get the invoice.

"Q. Well, did you examine these goods personally when they arrived in Chicago?

"A. I did, yes.

"Q. Where did you examine them?

"A. I examined them at our warehouse at 352 West Illinois Street.

"Q. Is that a cold-storage warehouse?

"A. Yes, sir.

"Q. And what degree of temperature do you keep that storage warehouse in?

"A. We keep that most of the time around 20; not above 26.

"Q. Do you remember the day that you examined these goods, or about the date you examined them?

"A. Well, it was the day after the goods arrived in the warehouse.

(Deposition of Matthew H. Theis.)

"Q. What condition did you find them in?

"A. Well, they were fermented; they showed signs of leakage; they were stained all around, and when they opened the head why it blew the top off the barrel, when we loosened up the staves it just blew the top right off.

"Q. You say that when you loosened the hoops on the barrels that the heads would blow out from the gas and fermentation of the berries; do you mean to say that all of them did that?

"A. All that I examined.

"Q. About how many did you examine of the one hundred lot? A. I examined five barrels.

"Q. How were those barrels picked, at random?

"A. They were picked out of the lot at random, no specification given, just five barrels out of the lot. [212]

"Q. How did the balance of the lot appear from observation of the outside appearance of the barrels? A. Well, they were all the same way.

"Q. Were they all swelled?

"A. All that we saw; we didn't look at the entire one hundred barrels, you understand; they were swelled and the barrels stained.

"Q. Is there a custom among the trade in Chicago, Illinois, with reference to the selection of barrels or packages to be examined in a case of that kind?

"A. Why, yes, they take a certain number of barrels of cases, whatever is being examined, out of a car lot or a lot at random.

(Deposition of Matthew H. Theis.)

"Q. Your answer is yes, is it? A. Yes.

"Q. What is that custom?

"A. Well, they pick out a certain number of cases or barrels from the lot at random.

"Q. And if those cases or barrels which they select from these goods to be examined show a product to be in good condition, they take the lot as being in good condition, do they? A. Yes.

"Q. And if the barrels or cases that they examine show the product to be in poor or bad condition, they take the whole lot to be in a similar condition, is that right? A. Yes, sir.

"Q. And trades and deals are closed according to custom on that practice and theory, are they?

"A. Yes, sir.

"Q. Now, what did you do with these loganberries that you received from Mr. Baker at this time?

"A. Why, we left them in the warehouse in cold storage and notified [213] Mr. Baker of the condition of the barrels, sent him a wire.

"Q. What was the price you paid for these berries?

"A. 17½¢ per pound f. o. b. Portland, Oregon, January 8, 1920.

"Q. Well, your company rejected these goods, did they? A. Yes, sir.

"Q. For what reasons, if any?

"A. Well, they rejected them for the reason that they were fermented and unfit for use.

"Q. How did you dispose of them?

(Deposition of Matthew H. Theis.)

"A. We have 120 barrels still down in the warehouse.

"Q. What are they worth?

"A. They are not worth anything to us.

"Q. Mr. Theis, in the handling of loganberries and other berries, packed in barrels in the manner known as cold pack, have you ever before or since had any trouble or found them fermented?

"A. You mean this particular lot?

"Q. From Mr. Baker, yes, I meant to include that, berries purchased from H. A. Baker?

"A. Never had any trouble before or since.

"Q. That is the only lot of berries or fruit that you ever purchased from Mr. Baker that you have had any trouble with, is it? A. Yes, sir.

"Q. Covering the period of how many years that you have been buying fruit of Mr. Baker?

"A. Well, eight years.

"Q. Now, Mr. Theis, can you tell us now, what date it was that you had that 100 barrels transferred to you, to your Company?

"A. July 29, 1920; that is, transferred from H. A. Baker to John Sexton & Co., covered by warehouse receipt number 224.

"Q. Issued by what company?

"A. National Cold Storage and Ice Company, 309 East Washington Street, Portland, Oregon. [214]

"Q. Now, Mr. Theis, these barrels were transferred to you in the cold-storage warehouse at Portland, Oregon, and kept for you there until November of that year, is that right?

(Deposition of Matthew H. Theis.)

"A. November, 9, 1920, I ordered out 100 barrels; December 3 was the date of the shipping bill; the date the railroad shipped the goods, or received the goods from them was December 3. Wait a minute,—that is the date of the bill, that is not the date that they were shipped. November 16th they were shipped from the warehouse.

"Q. In Portland, Oregon? A. Yes, sir.

"Q. When did you receive them here in Chicago from the railroad?

"A. December 3 is the date of the freight bill; about December 3d.

"Q. Mr. Theis, do you know, or have you any records indicating the condition of these barrels and berries at the time they were received by the Railroad Company and turned over from the warehouse, cold storage company, to the Railroad Company?

"A. I haven't got the record here, but I know that the bill of lading was marked, showed that the barrels were stained, and the Railroad Company made a notation on their bill of lading that the barrels were stained.

"Q. Do you know when you received them here in Chicago, Mr. Theis? If so, state.

"A. I don't know the exact date. As soon as I get it from the records that I have over at the office I can tell you, if you want the specific date, but I can't give it to you, but it was about December 3d.

"Mr. BOOTHE.—Q. Received by you?

(Deposition of Matthew H. Theis.)

"A. Received at the warehouse. The goods are always shipped direct to the cold storage from the cold storage.

"(Document marked Plaintiff's Exhibit One for Identification.)

"Mr. ELEY.—Q. I hand you what purports to be a freight bill of the Chicago & Northwestern Railway Company, marked Plaintiff's [215] Exhibit One for Identification, and ask you what that is.

"A. It is an expense bill for freight covering 100 barrels of loganberries shipped from the National Cold Storage & Ice Company of Portland, Oregon, to the John Sexton & Co., care of the Union Cold Storage Warehouse, 16th and State.

"Q. Is that the freight bill for the freight on the 100 barrels of berries that you have been just testifying about? A. Yes.

"Mr. ELEY.—I will offer it in evidence and ask that it be marked Plaintiff's Exhibit One.

"Said document is attached hereto and made a part hereof and marked Plaintiff's Exhibit One."

Mr. SPENCER.—The document is attached and marked Plaintiff's Exhibit One. That is to the original.

COURT.—It is merely the freight bill?

Mr. SPENCER.—Yes. (Continues reading deposition:)

"Q. Mr. Theis, after examining this freight bill, have you anything to say as to the place where you examined these goods in connection with the

(Deposition of Matthew H. Theis.)

evidence that you have heretofore given, wherein you stated that you had examined them at your warehouse?

"A. They were examined, the five barrels that we picked out from the lot, we picked five barrels at random and hauled them over to our cold storage, and opened up the barrels and found them in that condition. I might add this, that the rest of the barrels also were fifty to sixty pounds short in weight all the way through the lot.

"Q. Due to what, in your opinion?

"A. Due to fermentation and loss from leakage, caused by gas, and bursting the heads and springing the staves.

"Q. Now, have you the bill of lading covering that 100 barrels of loganberries? [216]

"A. Yes, sir.

"Q. I hand you what purports to be a bill of lading issued by the Union Pacific Railway Company, marked Plaintiff's Exhibit 2 for Identification, and ask you if that is the bill of lading that covers these 100 barrels of loganberries that you have just been testifying about? A. Yes, sir.

Mr. ELEY.—I ask that that be marked Plaintiff's Exhibit 2 and attached to the deposition.

"Document marked Plaintiff's Exhibit 2, and same is attached hereto and made a part hereof."

Mr. SPENCER.—Is that attached to the original?

COURT.—I suppose it is attached here; I don't know. Yes.

(Deposition of Matthew H. Theis.)

Mr. SPENCER.—Does that have any notations on it?

COURT.—"All barrels stained" it says.

Mr. SPENCER.—And that is the bill of lading, as I understand it, issued by the railroad company to the National Cold Storage and Ice Company.

COURT.—Issued to the National Cold Storage and Ice Company.

Mr. SPENCER.—I will offer that bill of lading as evidence as part of the deposition, the bill of lading issued by the Railroad Company to the National Cold Storage and Ice Company.

Mr. BOOTHE.—Do you want to read it?

Mr. SPENCER.—I didn't know whether it was in evidence or not. It is attached. I think I will not take time to read it. The witness referred to it already in his testimony. It shows the witness did refer to these barrels as stained. (Continues reading deposition:)

"Q. Now, Mr. Theis, were there any identification marks on these barrels, or any of them, such as numbers?

"A. I have a letter here from the National Cold Storage and Ice Company, which finishes up by saying, 'We are returning the schedule of [217] barrels which should be attached to said receipt, which shows the numbers of the barrels shipped, checked in red.' And we had 200 barrels out there, and they shipped us 100 of the 200, and the barrels that they shipped us they checked in red. That is attached right here, these are the barrel numbers.

(Deposition of Matthew H. Theis.)

"(Said document was marked Plaintiff's Exhibit 3 for Identification, three sheets.)

"Q. Now, Mr. Theis, I hand you a letter marked Plaintiff's Exhibit 3 for Identification, and ask you where you received that, where you got it, if you ever saw it before?

"A. I received that in reply to my request from the National Cold Storage and Ice Company at Portland, Oregon.

"Q. Did you get that through the regular course of mail? A. Yes, sir.

"Q. And was the exhibit with the numbers on, attached to that letter, received at the same time, in the same enclosure, the same envelope?

"A. Yes, sir, they were received at the same time. I imagine they were in the same envelope.

"Q. Did you compare the numbers on these 100 barrels with the numbers checked on this list, or did you have it done?

"A. Yes, I had it done in the office.

"Q. Are these the numbers as shown by this list in red, that appear on the barrels, on these 100 barrels that you have been testifying about?

"A. Yes, sir.

"Q. Now, Mr. Theis, about how many barrels of loganberries a year do you handle?

"A. We probably handle from one to three hundred barrels, it depends on the season.

"Q. How many barrels of other fruits do you handle, such as strawberries, raspberries and blackberries? [218]

(Deposition of Matthew H. Theis.)

"A. Ten or twelve cars, consisting of 100 barrels to the car; besides a lot of other fresh fruits in cases.

"Q. Now, Mr. Theis, in your opinion, if these loganberries about which you have testified had been kept in a temperature of 26 degrees or less, would they have fermented or spoiled in any way whatever? A. I don't think so.

"Q. How long in your opinion would loganberries, particularly, or any other fruit, such as strawberries and raspberries, keep in barrels in the method that is called cold pack, if kept in a temperature of 26 degrees or less?

"A. Well, if kept at that temperature they keep from fermenting as long as you keep them in there.

"Q. Well, how long would they keep good?

"A. They would lose their color a little bit, but they would keep as long as they were left in there.

"Q. Would there be any other sign of deterioration, if any, except as to color? A. No.

"Q. Mr. Theis, from your experience in the handling of fruit, berries, particularly loganberries, if loganberries were picked during the months of July and August in the State of Oregon, in the neighborhood of Salem, Oregon, and were packed during the afternoon or evening of the same day in which they were picked from the bushes, and within six or seven hours after they were packed in barrels they were transported and placed in cold storage, what would be the condition of those berries as to fermentation?

"A. There would be no fermentation.

No. 3965

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

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(Pages 257 to 523, Inclusive.)

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(Deposition of Matthew H. Theis.)

"Q. Would there in your opinion be any deterioration or loss in quality? A. No, sir.

"Q. Mr. Theis, do you know what the market price of loganberries was, such as you purchased from H. A. Baker on this contract under which you [219] received these 100 barrels, on the day you received them here in Chicago?

"A. The market price was 17½¢ f. o. b. Pacific Coast.

"Q. And the price had not changed, that is, from the time you contracted for them until the time you received them? A. No, sir.

"Mr. ELEY.—I think that is all, Mr. Boothe."

Mr. SPENCER.—Shall I read the cross-examination?

Mr. BOOTHE.—Yes, go ahead.

Mr. SPENCER.—I would just as soon turn it over to you. This is cross-examination by Mr. Boothe.

Mr. BOOTHE.—If you can give the proper inflection I will take your word for it.

Mr. SPENCER.—All right, I will do that. (Reads deposition:)

"Q. Mr. Theis, what do you mean by the expression 'cold packed' berries?"

Mr. SPENCER.—If you don't mind, Mr. Boothe, I believe you would better read this. I am tired.

Mr. BOOTHE.—Are you? All right, I will assist you, then. (Continues reading of deposition:)

(Deposition of Matthew H. Theis.)

"Q. Mr. Theis, what do you mean by the expression 'Cold packed' berries?

"A. It is berries packed in barrels, not to be cooked. There is two different packs of cold pack, one with sugar and one without. When they are packed raw without any other method of preservation except cold.

"Q. Then would you say that loganberries picked and put into barrels in the afternoon or evening of the *same that* they were picked, would be what you term cold pack?

"A. Not cold packed, no; they could not be packed cold if they went in hot. [220]

"Q. That is what I am trying to find out, what you mean by cold packed berries?

"A. That is a trade term.

"Q. These, then, would not be considered cold packed, would they?

"A. I didn't say they were cold packed. Cold pack, when you buy loganberries, it is a trade term, you buy 100 barrels of cold pack.

"Q. Well, now, let us get again, what is cold pack.

"A. Cold pack means berries taken from the field and put in barrels and put in cold storage.

"Q. They must be in cold storage, then, to come within the term of cold pack, as you have expressed it?

"A. They have to be in cold storage after they are packed.

"Q. How soon would they have to be put into cold

(Deposition of Matthew H. Theis.)

storage after they were picked and put into barrels, to make them come under the term or denomination of cold pack?

"A. Well, say within forty-eight hours. You are speaking of loganberries, now?

"Q. Yes. You had no business relations with the National Cold Storage and Ice Company, the defendants herein, except to receive from Mr. Baker the transfer of certain barrels of loganberries, had you? A. That is all.

"Q. You bought these loganberries from Mr. Baker, as you say, and had the shipping receipts transferred to you, and you ordered them out of the warehouse in Portland at the time that you have mentioned here, that is about all you had to do with them?

"A. No, not shipping receipts, the warehouse receipt.

"Q. Warehouse receipts, I should have said, instead of shipping receipts. Now, if these goods were shipped from Portland on November 16th and received by you at Chicago on December 3d, they would have been en route something like seventeen days, would they not?

"A. Yes, sir. [221]

"Q. Do you know whether or not these goods that you bought from Mr. Baker about which you have testified were conveyed in refrigerator cars?

"A. Yes, sir; they were.

"Q. Do you know what degree of refrigeration they were in during the time of their transit? I am asking if you know?

(Deposition of Matthew H. Theis.)

"A. I don't know the car where they were.

"Q. Then you don't know, do you?

"A. No, sir.

"Q. You don't know whether they were above 26 degrees refrigeration or not, do you?

"A. No, sir.

"Q. You don't know whether they were salted, whether the ice was salted during the transit, do you? A. No, I do not.

"Q. Do you know whether or not the cars were re-packed with ice at any time while in transit?

"A. If the cars were what?

"Q. Re-packed with ice at any time while in transit?

"A. I do know that, because we were charged for re-icing; if the railroad charges for icing and didn't put the ice in, why then that is another proposition. Our instructions to the railroad were to re-ice at all icing stations.

"Q. Were those goods marked in good order by the shipper or the railroad company or the canner when they were started from Portland?

"A. No, they were not.

"Q. I notice from examination of Plaintiff's Exhibit 2, there is a stamp on this bill of lading, 'All barrels stained'; do you know who put that stamp on this bill of lading?

"A. I don't know positively. It is assumed that the railroad put it [222] on; I didn't see anybody write it on there.

(Deposition of Matthew H. Theis.)

"Q. Do you know whether or not the goods contained in the National Cold Storage and Ice Company's plant, for which Mr. Baker is now suing the National Cold Storage and Ice Company, were part of the same goods that you purchased from Mr. Baker, or do you know whether the goods that you purchased from Mr. Baker were part of those now in question between the plaintiff and the defendant?

"A. I don't know anything about Mr. Baker's business at all.

"Q. You bought these goods from Mr. Baker during the year 1920; at about what time did you make the purchase?

"A. January 9, 1920, is the date of the contract here, January 8th.

"Q. January 8th, 1920? Now, on your direct examination you were asked the following question: 'From your experience in handling fruit and berries, particularly loganberries, if loganberries were picked during the months of July and August in the State of Oregon, in the neighborhood of Salem, Oregon, and were packed during the afternoon or evening of the same day in which they were picked from the bushes, and within six or seven hours after they were packed in barrels they were transported and placed in cold storage, what would be the condition of those berries as to fermentation.' Your answer to that question was that they would be good, I believe? A. Yes, sir.

"Q. In answering that question it was not stated

(Deposition of Matthew H. Theis.)

to you how long they were in transit, or how long after they were picked and packed and put into the warehouse? A. I said six hours.

"Q. That was what you meant, was it?

"A. It says from six to seven hours.

"Q. They must have been put into the warehouse within six or seven hours, then? [223]

"A. It mentions that in the question.

"Q. And if it was more than six or seven hours, there might be some there?

"A. No, I don't say that.

"Q. I am asking you if there would be any there?

"A. No, there would not.

"Q. There would not be any there?

"A. No, sir.

"Q. How long could they remain in these barrels in the months of July and August without being damaged?

"A. Well, if they were—you mean outside?

"Q. Outside of the cold storage?

"A. I would say that forty-eight hours would still keep them in average condition. Longer than that, I don't believe they would—they would commence to deteriorate.

"Q. Suppose that these goods were picked and packed as suggested in that question which you have answered, and transported by open trucks during the day-time, and in the summer months, say in July and August, what effect would the warm weather and jolting of barrels in transit have upon the berries?

(Deposition of Matthew H. Theis.)

"A. I don't believe it would have any effect on loganberries.

"Q. You don't think it would hurt them, then, to jolt them and knock them around?

"A. No, not loganberries; they are hardy berries.

"Q. Would you say that if loganberries were picked in and about Salem, and packed in barrels at the time you have mentioned, and conveyed in trucks to Portland, Oregon, a distance of some fifty-two miles, and these berries would be fermenting when they arrived there, if they were taken there within forty-eight hours?

"A. I don't believe they would be fermenting.

"Q. Suppose, then, as a matter of fact when they arrived at the cold storage plant they were fermenting and blowing up; what would you say was the cause of this? [224]

"A. Well, that fermentation is caused by lots of things. I can make loganberries ferment inside of twelve hours by taking and mashing them up. There might be different causes. If they took berries and the berries were packed and were fermented, why, they evidently were probably four or five days old.

"Q. Then if those berries were delivered to the cold storage plant in a fermenting condition, and a blowing up condition, they must have been handled in a bad way, some way or another, provided they were taken there within forty-eight hours, is that not true?

(Deposition of Matthew H. Theis.)

"A. No, it would not be possible to have fermented berries in forty-eight hours.

"Q. Well, I am asking you, suppose if it should appear that that was the fact, that they were fermenting when brought to the cold-storage plant, then they must have been mishandled or miskept in some way or another, must they not?

"A. Yes, but you said within forty-eight hours.

"Q. Well, within forty-eight hours.

"A. I can't reconcile myself to the fact of loganberries spoiling in forty-eight hours. If they came there fermented without my knowing what time they were handled from the field, I would say that they were mishandled, but not within forty-eight hours, because I have known fresh loganberries to be shipped from Oregon into Chicago here, and it takes a longer time than forty-eight hours to get them here, and they still were fresh, so you could not have them fermented in forty-eight hours.

"Q. Well, you have stated that there are so many hours in which they can be made to ferment?

"A. Well, as I say, unless you deliberaterly take a masher and mash them up like you would grapes for wine, or something to that effect, it would cause fermentation. [225]

"Q. Would you say that loganberries, picked and packed within six or seven hours, as you have mentioned, and hauled some fifty-two miles and put in cold storage, could be termed frozen berries?"

Mr. BOOTHE.—I will say these questions were brought about by the complaint, the term "frozen."

(Deposition of Matthew H. Theis.)

Mr. SPENCER.—I understand.

Mr. BOOTHE.—(Continues reading deposition as follows:)

"Q. If loganberries are packed in barrels within a proper time after they are picked, and put into a cold-storage plant in good condition, will they not remain in good condition at a temperature of as high as 36 degrees?

"A. No, not unless they are chilled first, no, they will not.

"Q. Are you a chemist?

"A. No, sir, I am not a registered chemist, no; but I know enough about some things that probably a lot of chemists don't know.

"Q. Have you ever kept any loganberries in storage as high as 36 degrees?

"A. Well, not any quantity of them; I might have kept a barrel and left them out. But from my experience, I know that they would not keep at 36 degrees.

"Q. Now, take these loganberries that you have rejected, is it not a fact that these berries can be re-processed and bring them back into substantially their original condition? A. No, sir.

"Q. Do you know how they are re-processed?

"A. The only way you can get loganberries—the only way that these loganberries could be used would be by re-cooking them, and you could never bring any fruit back to its original form after it once started to ferment.

(Deposition of Matthew H. Theis.)

"Q. They are not injured much by the fermentation, are they?

"A. Yes, they are; fermentation breaks down the cells or fibers of the fruit; and by cooking the loganberries you could not bring them back [226] to the fresh state.

"Q. Where are these 100 barrels now?

"A. The second hundred barrels are down in, I think, the Western Cold Storage.

"Q. You got the full 200 barrels, did you?

"A. We got the full 200 barrels.

"Q. You have rejected them all, have you?

"A. We rejected them, yes.

"Q. As bad? A. Yes.

"Q. Have you taken any legal proceedings against anybody regarding them?

"A. Yes, sir; we notified the National Cold Storage and Ice Company and they were very arbitrary in the matter; they didn't think that they were at fault at all.

"Q. What did you notify them for?

"A. Well, who would I notify?

"Q. Why would you notify the National Cold Storage Company?

"A. They had the goods in their control.

"Q. They were shipped in good condition, were they not?

"A. No, sir, not according to all indications, they were not; we pack goods and put them in storage and the storage company is supposed to keep those goods for you in perfect shape; that is why you put

(Deposition of Matthew H. Theis.)

them there. Anybody can take goods and let them go to waste or spoil.

"Q. Has anyone brought any legal proceedings against the Railroad Company for damages for the miscarriage of these goods?

"A. No, sir, because the possibility of the claim is for various reasons, one reason was noted on there when they received the goods that the barrels were stained, and the second reason is that the barrels came in fifty or eighty pounds short, which would not happen in sixteen days' time. [227]

"Q. Did you pay Mr. Baker for those goods?

"A. I paid him before I brought them out; we paid him against his warehouse documents a few days after the date of the invoice.

"Q. Then the full 200 barrels have been paid for by you? A. By me, yes.

"Q. Are you taking any legal proceedings against Mr. Baker concerning them?

"A. I don't know whether we have or not, to tell you the truth, because I don't handle those matters myself, and whether we have gone as far as legal proceedings I could not state definitely.

"Now, let us come back to the issues in this case. You have testified generally about goods that you bought from Mr Baker; now, let me state to you that in this case at issue Mr. Baker is suing the National Cold Storage Company for the total loss or destruction of some 398 barrels of loganberries stored in their warehouse; do you know of your own knowledge what the condition of those berries was

(Deposition of Matthew H. Theis.)

when they were put into the cold storage, into the cold-storage plant? A. I do not.

"Q. Of course you don't know when they were put in there? A. No, sir.

"Q. Now where they were picked? A. No, sir.

"Q. You have stated that the price of loganberries was 17½¢ f. o. b.; does that mean here in Chicago, or where does it mean?

"A. It is 17½¢—well, it depends on whether you say f. o. b. Chicago, it would mean Chicago; if you say Portland, it would mean 17½ cents out there.

"Q. Can you state what was the value, the price, of loganberries in Portland, Oregon, during July, 1920? [228]

"A. I can state what Mr. Baker's price was, it was 17½ cents.

"Q. I know, but do you know what they were worth on the market?

"A. Yes, they were worth—I guess you could not buy them anywhere else; the Chicago market was about 19½ cents.

"Q. Do you know what the Portland, Oregon, market was at that time?

"A. Well, yes, they were offering goods and getting 17½ cents and more for them.

"Q. Do you know of any sales that were made in Portland at 17½ cents? A. No, I do not.

"Q. Do you know of any sales that were made in Portland in July, 1920, at any price?

"A. You mean to someone else?

"Q. Yes. A. I don't know.

(Deposition of Matthew H. Theis.)

"Q. Then you cannot state the reasonable value of loganberries?

"A. I can certainly state that, surely.

"Q. In Portland, Oregon, in July, 1920?

"A. Market values are market values, whether it is Portland, Oregon, or San Francisco, or anywhere else; because it is just like buying sugar; sugar is worth so much at the refinery, whether it is in one State or another. It is the market on the goods.

"Q. Well, this is a question, a case for damages for goods at Portland, Oregon?

"A. Well, that was the market price.

"Q. And you are going to say that that was the market price in Portland, Oregon, in July, 1920?

"A. Surely.

"Q. But you don't know of any sales that were made there? A. No, sir.

"Mr. BOOTHE.—That is all.

"Redirect Examination by Mr. ELEY."

Mr. SPENCER.—Go ahead. [229]

Mr. BOOTHE.—(Continues reading deposition:)

"Q. Mr. Theis, you stated in your cross-examination that in your opinion loganberries would not ferment in forty-eight hours; if they are packed in barrels and before placed in storage, would keep for forty-eight hours; do you mean under any and all conditions?

"A. That is, conditions like taking goods off of the field.

"Q. Supposing they were packed in barrels in the customary way of packing, and the barrels left

(Deposition of Matthew H. Theis.)

standing in the hot sun; what effect do you think that would have?

"A. If they were left standing in the hot sun for a long time, it might have some effect on them.

"Q. Now, you also mentioned, or stated, in reply to one question of Mr. Boothe's, that loganberries placed in a temperature of 36 degrees after first being chilled, that they would not ferment.

"A. Well, I mean a reasonable time.

"Q. How long a time would you say was a reasonable time?

"A. Well, if they were brought out of a temperature of 26 to 36 and left, say, a week, why they would probably commence to show signs of deterioration.

"Q. In other words, it is your opinion, then, that if they were kept in a temperature of 36 degrees for a week or so, even after being chilled, they would begin to ferment, or deteriorate? A. Yes, sir.

"Q. When you refer to the price of loganberries at Portland, Oregon, in the summer of 1920, in the months of July and August, what manner of pack do you refer to?

"A. Loganberries packed in barrels.

"Mr. ELEY.—I think that is all.

"Recross-examination by Mr. BOOTHE.

"Q. Well, if the loganberries had fermented before they were put in [230] cold storage, and were frozen by the cold-storage company, would they ferment any easier after that if the temperature was allowed to go up? In other words, after they had

(Deposition of Peter J. Slaughter.)

once fermented, would they ferment easier again if the temperature went up?

"A. Why, naturally.

"Mr. BOOTHE.—That is all."

Mr. BOOTHE.—That is all this man is asked.

Whereupon proceedings herein adjourned to Wednesday, June 14, 1922, at 10:00 o'clock A. M.

Portland, Oregon, Wednesday, June 14, 1922, 10 A. M.

Mr. SPENCER.—This is the deposition of PETER J. SLAUGHTER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

COURT.—What page is that, Mr. Spencer?

Mr. SPENCER.—Page thirty-eight. (Reads deposition:)

Deposition of Peter J. Slaughter, for Plaintiff.

"Direct Examination by Mr. ELEY.

"Q. State your name. A. Peter J. Slaughter.

"Q. Where do you reside?

"A. Chicago, Illinois; my home address?

"Q. Yes. A. 701 North Latrobe Avenue.

"Q. How long have you lived in Chicago?

"A. About twenty-nine years.

"Q. What is your business, Mr. Slaughter?

"A. Manager of the preserving, manager of the manufacturing end of the preserves, syrups and jellies.

"Q. What company are you with?

(Deposition of Peter J. Slaughter.)

"A. It is called the Wholesale Grocers' Corporation now; at that time it was the Durand & Kasper Company.

"Q. When was the change made from Durand & Kasper Company?

"A. Last July, July 1st. [231]

"Q. How long have you been connected with Durand & Kasper? A. Twenty-seven years.

"Q. And the Wholesale Grocers' Corporation?

"A. Twenty-seven years.

"Q. How long have you had charge of the canning and preserving department?

"A. About twenty-two years.

"Q. What are your duties as manager of the department in a general way, stating in a general way? A. Buying and overseeing the packing.

"Q. Where is the packing done, in Chicago, or outside of Chicago? A. In Chicago.

"Q. You have full charge and direct supervision of the canning and packing department?

"A. Complete charge.

"Q. Have you occasion to buy for your company, or make contracts for your company, of fruits, such as strawberries and raspberries and loganberries, and things of that kind?

"A. All the time, as I see fit, in my own judgment.

"Q. What quantities of these on an average per year do you handle, in carload lots or in barrel lots?

"A. Well, the majority would be in cars, right here in the market, I would say averaging maybe

(Deposition of Peter J. Slaughter.)

four cars of barrel stuff a year; of course there would be thousands of cases.

"Q. You are familiar with the different kinds of packs of fruits, are you? A. Yes, sir.

"Q. What are the different kinds?

"A. That is, straight fruit, or two and one, or three and one?

"Q. Is there a term in the packing industry known as 'cold pack'?

"A. Yes, that is what I call a cold pack.

"Q. What is 'cold pack,' if you know? [232]

"A. The raw fruit; it is a fresh fruit put right in.

"Q. What do you mean, really, by 'cold pack'?

"A. That would be the raw fruit right from the field without being cooked.

"Q. And it is either packed with sugar or without? A. Or without, as you want it.

"Q. What is the cold pack without sugar called?

"A. Straight.

"Q. Have you had occasion, did you have any business dealings with H. A. Baker during the year 1920? A. Yes, I did.

"Q. What was that?

"A. That was 100 barrels of loganberries; I think I got some red raspberries from them, too,—or strawberries, 100 barrels of strawberries. I bought two lots from them.

"(Document marked Plaintiff's Exhibit 4 for Identification.)

"Q. I hand you what purports to be a memorandum or a contract, marked for identification Plain-

(Deposition of Peter J. Slaughter.)

tiff's Exhibit 4, and ask you whether or not that is a memorandum of the contract you referred to, which you entered into with H. A. Baker in 1920, or one of them?

"A. This is the original one of those; I had it changed to straight fruit.

"Q. Was there a new contract entered into?

"A. No, it was not; it was optional, which one I wanted.

"Q. The contract was changed, then, by exercising your option? A. That is right.

"Mr. ELEY.—I will ask that that be attached to Mr. Slaughter's deposition as an exhibit.

"Said document is attached hereto and made a part hereof, and marked Plaintiff's Exhibit 4. [233]

"Q. Now, Mr. Slaughter, did you receive, did your company receive the goods, the fruit, called for in that contract? A. We did not.

"Q. Did you receive any goods under the terms of said contract?

"A. That lot we did not, but it was several months afterward, we received fifty barrels; we had lost all kinds of sales by not getting that contract; we had lost practically all the bids on fifty barrels or maybe seventy-five barrels of the loganberries; we still have some of the loganberries to-day.

"Q. Well, did H. A. Baker tender you any goods under the terms of the contract?

"A. Well, he did later on, but we had an awful job to get them; they all came in bad shape, you see; there is where it really came in, anything I

(Deposition of Peter J. Slaughter.)

went over to look at, they were in the same condition.

"Q. Did he tender you any goods at all, at that time?

"A. No, he did not. I think, if I am not mistaken, it was some three or four months afterward; afterward I got some.

"Q. Now, Mr. Slaughter, did Mr. Baker at any time tender you any loganberries under the terms of that contract? A. Yes, he did.

"Q. About what time was it, do you know?

"A. Well, it was, I think probably two or three weeks after that, the lot came in.

"Q. After what?

"A. After this first lot, that lot there.

"Q. That lot was sent to you, was it?

"A. That lot was sent, and I rejected it.

"Q. Where was it sent to, Mr. Slaughter?

"A. Here on this railroad right down here, I don't know as I can call it, on 16th Street, and it belongs to the cold storage on the North Side, they have got a branch over there.

"Q. You were notified, were you, that they were here? A. I was, by the railroad. [234]

"Q. What did you do then?

"A. I went over and looked at it; they told me before that it was in a terrible condition, to come out and look at it; and I went over, and I got busy right away and called the Railroad Company on the telephone.

"Q. You examined the car, did you? A. I did.

(Deposition of Peter J. Slaughter.)

"Q. What did you find the condition of the goods to be in?

"A. I found the loganberries were splattered all over the car, barrels bursted open, and in a horrible shape, sour; they were in such condition that I could not use them.

"Q. What was the price you were to pay for those berries? A. 17½, I think.

"Q. F.O.B. Chicago, or F.O.B.—

"A. F.O.B. there.

"Q. Where, do you mean? A. That is, Coast.

"Q. Now, I will ask you again, Mr. Slaughter, did you examine the berries in the car, freight-car, or were they in cold storage when you examined them?

"A. In the freight-car; they took them out on the platform for me.

"Q. How many barrels did you examine?

"A. I guess I stood there probably at least two hours and a half.

"Q. Did you examine half of them?

"A. Oh, absolutely; I seen practically pretty near all of them.

"Q. Were they received in a refrigerating-car?

"A. They were.

"Q. Did you observe whether the car was well iced or not?

"A. There was ice in it.

"Q. Have you had occasion in your business experience to store loganberries in cold storage warehouses? [235]

"A. Not loganberries, but all other fruits, I have.

(Deposition of Peter J. Slaughter.)

"Q. What other fruits, for instance?

"A. Well, for instance, I would say, loganberries, if I would put that car of loganberries in, I would give them instructions what temperature I would demand them kept in.

"Q. What temperature would you demand them kept in? A. From 16 to 26.

"Q. Have you ever had any experience in strawberries or raspberries? A. Yes, sir.

"Q. And in your opinion, what difference if any is there in the requirements of temperature between loganberries and raspberries and strawberries?

"A. None at all.

"Q. Then in your opinion would you say that whatever requirements as to temperature in storage apply to one class of fruit would apply to another?

"A. Absolutely.

"Q. As far as loganberries, strawberries and raspberries are concerned? A. Yes, sir.

"Q. Are you familiar with the plan of handling such fruits from the time they are picked to the time they are put in cold storage?

"A. Absolutely.

"Q. Will you state what is the usual time required to transport and take the fruit, such as raspberries, strawberries and loganberries, fom the vine to cold storage?

"A. No, I could not tell you that, because that is practically a Coast affair, you see.

"Q. Well, you have said that you have had a great deal of experience in the packing and pre-

(Deposition of Peter J. Slaughter.)

serving of fruits, bought in the market here in Chicago, that is, raw fruits? [236]

"A. Yes, raw fruits.

"Q. Now, do you know what time it takes on the average, to get those fruits from the bush or vine to your cold-storage plant, in Chicago?

"A. Why, I would say, if a berry is picked, say, to-day, I would get it here the next day at about the same time.

"Q. About twenty-four hours?

"A. About twenty-four hours and they would be in the cooler.

"Q. What effect would the weather have upon—I mean the temperature of the weather, have upon the berries from the time they were picked to the time they were put in cold storage, say, in that twenty-four hours, if any? A. It would not have any.

"Q. In your opinion, Mr. Slaughter, how long would it take in the months of July and August, at the berry picking time in this country, to cause the berries to spoil in transferring them or transporting them from the vine to the cold-storage plant?"

Mr. BOOTHE.—That question I object to, speaking of "in this country."

COURT.—It is too general.

Mr. SPENCER.—All right. I will omit it. Perhaps the next one is the same. Several questions there all refer to that subject.

COURT.—Down towards the bottom of the page, —state when fermentation takes place.

(Deposition of Peter J. Slaughter.)

Mr. SPENCER.—(Continues reading deposition:)

"Q. Now, Mr. Slaughter, how can you tell when fermentation starts on fruits packed in barrels; in the way that these loganberries were packed that were mentioned in that contract?

"A. It forms gas; the minute you give it air, give it a vent, why it will go all over the place, the minute she starts to ferment.

"Q. What do you mean by 'going all over the place'?

"A. You take one of those barrels that is bulged, that has got gas, and the minute you give it a vent it will blow right out. You see [237] it is continually working in there.

"Q. From your experience and in your opinion, if such fruits as strawberries, raspberries and loganberries packed in barrels in what we understand would be cold packed, keep in a temperature of 26 degrees, if they were in good condition when put in that temperature?

"A. Well, I would say, I can say that I have kept them for over three years, I have had some that kept three years, absolutely perfect.

"Q. In your experience, have you received and examined many barrels of fruit in fermented condition? A. I certainly have.

"Q. Have many come in a fermented condition?

"A. No, I would not say they did; now and then you might find them.

(Deposition of Peter J. Slaughter.)

"Q. Now, in the fruits that arrive here in Chicago, that you have purchased for your manufacturing business, I mean the raw fruits, how are those shipped in, if you know?

"A. In refrigerator-cars.

"Q. Where do the most of them come from?

"A. Why, they come from Washington as a rule, the majority of them, some from down south in Tennessee. I would say the majority of my fruit I buy right here, fresh fruit in cars.

"Q. Where does that fruit come from?

"A. From Michigan, Tennessee and Louisiana.

"Q. And when you say it takes at least twenty-four hours for the fruit to come in here, you mean, do you, that that is the shortest time in which any of it can get here?

"A. That is considered, for Michigan it is figuring a long time; generally they pick over there in the morning of that day, and in the afternoon you get it here, or first thing in the evening; I think three o'clock in the afternoon and five in the morning, I think.

"Q. Well, that that you get from Louisiana, what time would it get here? [238]

"A. It takes two or three days.

"Q. And is that usually in good condition when it arrives?

"A. Absolutely. In fact, I have never found any that was fermented that I ever knew of that came from there. I have found some leakers, of course, if they are tender berries.

(Deposition of Peter J. Slaughter.)

"Q. How are they usually packed?

"A. In crates.

"Q. Suppose loganberries were picked in Salem, Oregon, in the day, in July or August of the year 1920, or any other year, and they were transported to a packing plant near Salem, so that they would be packed in the same afternoon or evening of that day that they were picked, and they were packed in barrels, what is known as cold pack, and within six or eight hours thereafter, transported by truck to a cold-storage plant, say that within twenty-four hours after they were picked they were within cold storage; what in your opinion would the condition of the berries be at the time they were placed in cold storage? A. In A–1 condition.

"Q. What in your opinion, if any, would the condition of the weather have upon them in that time?

"A. It would not have any in that short time.

"Q. What effect, if any, would their method of transportation or handling them have upon them in that time?

"A. It would not have any in that short time.

"Q. Mr. Slaughter, this contract that we introduced in evidence calls for 100 barrels of loganberries. A. Yes, sir.

"Q. Did you have any other contract with Mr. Baker for loganberries?

"A. Not that I—I don't know.

"Q. What was the prevailing market price of loganberries at that time, that is, at the time these berries were tendered to you in 1920? [239]

(Deposition of Peter J. Slaughter.)

"A. I don't know that there is any change in the market price that would have any effect on them, but it was a matter that our stock was sold, most of it, you see, our goods was sold against these loganberries.

"Q. At 17½ cents? A. Yes.

"Q. F. O. B. Portland? A. That is true.

"Q. Could you or could you not have used more than you had contracted for at that price?

"A. Absolutely.

"Q. Were those barrels of loganberries that were tendered to you, that you have just been testifying about, identified by any numbers or marks?

"A. There were marks on them.

"Q. Have you any record of those numbers or marks? A. No, I haven't.

"Q. Were they numbered or marked by letter, or what was the identification mark?

"A. They were numbered.

"Q. And did Mr. Baker tender you any other loganberries at the time, that is, I mean in 1920, after you had rejected the shipment called for in that contract?

"A. He did; I think it is the same warehouse, if I am not mistaken, where these were to go, into the western.

"Q. Did you accept those?

"A. I did not, they were in the same condition.

"Q. What do you mean by the same condition?

"A. Well, they were sour, they bulged out, the heads, some of them, were ready to come out, and

(Deposition of Peter J. Slaughter.)

they were in horrible condition, in a fermented condition.

"Q. That is, in the same condition as the first lot that was brought? A. Yes. [240]

"Q. Now, Mr. Slaughter, what effect would the rise of the temperature in a cold-storage house above 26 degrees have upon fruit packed, on loganberries packed in barrels?

"A. Fermentation, sour, it would sour, ferment.

"Q. In your opinion, would fruit, such as loganberries, strawberries, raspberries, cold pack, straight, keep in a temperature of 32 degrees?

"A. It would not.

"Q. Would they keep in a temperature of 28 degrees?

"A. Well, I have always made it a point between 16 and 26, never to go any higher than that, because I would not take a chance above 26.

"Q. Mr. Slaughter, to what use, if any, could these berries that you have rejected be put, in your experience, in manufacturing?

"A. They probably could have been used by certain people, but we have no use for them, that is, for imitation stuff, you see, that is, where you would use about ten per cent fruit and the balance imitation.

"Q. What effect, if you know, did the pure food law of this state have upon your handling such fruit as was tendered you in these instances?"

Mr. BOOTHE.—I object to that question, that State of Illinois.

(Deposition of Peter J. Slaughter.)

COURT.—I don't think that is material.

Mr. SPENCER.—All right. Probably the next one is the same. The next one "You have to mark it, do you?"

Mr. BOOTHE.—How is that?

Mr. SPENCER.—The next one. (Continues reading:)

"Q. Well, supposing you attempted to manufacture it as good fruit, what would be the effect?

"A. Well, I think you would have a lot of it returned, and it would not give satisfaction, because you would get it in the taste of the fruit.

"Q. The fermentation would appear in the taste and quality of the goods? A. Absolutely.

"Q. Do you know when this first carload of loganberries was shipped to you, tendered? [241]

"A. I don't think I could tell you that.

"Q. You don't know the date, don't know the month? A. No.

"Q. About when was it?

"A. I don't know; that I could not tell you.

"Q. Was it during the summer of 1920, or fall?

"A. Late in the summer of 1920.

"Q. You mean by summer—

"A. I think it was in August, I am not sure now, I think it was in August.

"Q. 1920? A. 1920.

"Q. Do you remember when the second car was shipped and tendered?

"A. I don't offhand; I think it was a couple of weeks afterward; I don't remember right off, it

(Deposition of Peter J. Slaughter.)

may have been a little later that that, I think it was later; I think it was probably at least a month or something like that, later than that shipment came in.

"Q. Do you know what market controls the price of loganberries, if any market does?

"A. The supply and demand, I would say.

"Q. Well, do you know whether the price of loganberries changed any during the year 1920?

"A. I don't think it did.

"Mr. ELEY.—I think that is all, Mr. Boothe."

Mr. SPENCER.—Shall I read the cross-examination?

Mr. BOOTHE.—You may go ahead, if you feel like it.

Mr. SPENCER.—This is cross-examination by Mr. Boothe. (Continues reading.)

"Q. Mr. Slaughter, there was 100 barrels tendered to you the first time, is that right, and 100 barrels in the second? A. Yes, sir, 100 barrels. [242]

"Q. Where are those berries now?

"A. All the last ones we got are still in the warehouse.

"Q. Where are the first ones?

"A. The first ones were rejected.

"Q. What became of them? A. I don't know.

"Q. And the second 100, you say are still in the warehouse?

"A. Yes; we rejected the second ones also.

"Q. Well, the first ones you don't know where they are or what became of them?

(Deposition of Peter J. Slaughter.)

"A. I don't know where they went; no, I don't.

"Q. And the second hundred you say is in the warehouse?

"A. No, that is the third one; the second one I also rejected.

"Q. You rejected two and you accepted one, then?

"A. That is the third lot he showed me, the third 100.

"Q. Where did the third lot come from?

"A. Well, it came from the same place.

"Q. When did it come?

"A. Well, that came, I should judge maybe five weeks later, I think, something like that.

"Q. Did they have any signs of distress?

"A. This last lot?

"Q. This last lot.

"A. No, absolutely not, in perfect condition. In fact, I am drawing some out of them now, I still have some of that there lot.

"Q. Mr. Slaughter, if loganberries are allowed to ferment, can those be sweetened up and re-processed to bring them back to their original condition and practically good?

"Well, it may be when you catch it at the start, when you have just got a little bit, but not in the condition that those were in; I think [243] somebody would have to look for them, they were all over the car, they were in such a condition that I wouldn't ever touch them; I couldn't touch them.

"Q. Do you know what damaged them?

(Deposition of Peter J. Slaughter.)

"A. I could not say that; all I know is, they were in a fermented condition.

"Q. You didn't see them before they started, did you? A. No, I did not.

"Q. How did you happen to get them, did you buy warehouse receipts from Mr. Baker?

"A. No, we bought them from Mr. Baker.

"Q. You bought the berries from Mr. Baker?

"A. Yes, sir, from Mr. Baker.

"Q. Did he deliver you the warehouse receipts?

"A. After they got there.

"Q. You just bought them from him?

"A. Yes, sir.

"Q. Do you know where they came from?

"A. From Oregon.

"Q. Do you know what part of Oregon?

"A. No, I do not.

"Q. Can you say whether or not these goods were in a damaged condition before they started, that is, if you recollect? A. That I could not say.

"Q. All you know about them is when you looked at them in the car you found them in a terrible condition, as you put it? A. Absolutely.

"Q. Did it bear evidence of not proper refrigeration in the cars?

"A. No, it didn't; they had ice in the car at the time we got there.

"Q. Did you test the car to see what the temperature was? A. Yes, I did. [244]

"Q. What was it?

"A. I can't recall it right now, what it was.

(Deposition of Peter J. Slaughter.)

"Q. Well, did you find it above or below 26?

"A. Well, it was above twenty-six, but exactly I don't know, of course that comes quite a distance, you know, it is re-iced several times before it gets here.

"Q. And naturally you don't know what temperature was maintained at the different times?

"A. No, I do not.

"Q. What effect would the jarring and churning of the goods have in transit here?

"A. Well, if, for instance, if they were fermenting going in there, it would have a big effect on it.

"Q. I didn't get that answer.

"A. If she goes in there fermenting, it would have a big effect on it, it would start up very much quicker.

"Q. And suppose it went in there in good condition, does the jarring and churning of goods in transit on the railroad have a tendency to cause them to ferment? A. No, it would not.

"Q. All you know about where those berries came from is that they came from Oregon somewhere?

"A. Yes, sir.

"Q. Suppose, Mr. Slaughter, that loganberries were picked in and about Salem, Oregon, some fifty-two or fifty-six miles distant from the cold-storage plant of the defendants in Portland, and were put in barrels and shipped by trucks during the warm weather of July and August, how long could they safely be kept out of cold storage in that condition?

"A. I should say a couple of days.

(Deposition of Peter J. Slaughter.)

"Q. I understood you to say that in your direct examination? A. Yes, sir. [245]

"Q. Now, if as a matter of fact, Mr. Slaughter, when these trucks got up to the cold-storage plant with loads of these loganberries on them, and they were fermenting and blowing up, what would you say caused that?

"A. Then I would say that it was caused by the effect of the hot sun on them, it was delay, delay somewhere, I would say.

"Q. You would naturally think then that those berries had been kept out of cold storage more than twenty-four hours, more than two days, I mean, I think you said?

"A. Yes, I would say yes, more than that. Of course it is this way, too, it depends on where you would have them. If you had these loganberries in barrels and put them under the hot sun, you would start them, of course, naturally, quicker than you would if you put them in a cool place; there is a whole lot in that.

"Q. Now, if it should happen that these berries in transit to the cold-storage plant became fermented and were fermenting when put in there, and they were frozen, and then suppose after they had been in the cold-storage plant while the temperature should be allowed to rise somewhat,—and I will say here that the fermenting had been checked by the freezing—and then suppose the temperature had gone up to something above 28 degrees, and they would begin to ferment again,

(Deposition of Peter J. Slaughter.)

would they be any worse damaged by the second fermentation, or would the damage occur by the first fermentation?

"A. By the second; by giving them more heat.

"Q. What I meant to find out is, which would be the cause of the damage, that first fermentation or the second fermentation? A. The second.

"Q. Then the first fermentation would not hurt them, would it?

"A. It would not if you hold your degree in your cooler, if you have got your degrees in the cooler, it would not hurt them.

"Q. Well, suppose these berries came in there sizzling, we will say, and in unloading some of the barrels blew up? A. Yes. [246]

"Q. Now, that is the condition?

"A. Well, if they went in in that condition in the cooler, I think they would blow up in the cooler, it would never hold them, it would not hold them, she would blow just the same.

"Q. When you freeze them they would blow up?

"A. Absolutely.

"Q. They would blow up if you freeze them?

"A. Absolutely, unless you put the barrel half full and leave it enough room for that fermentation to hold, she would blow up.

"Q. You state then that if they were put there in a fermented condition, that the freezing would not stop them from blowing up?

"A. Yes, but it depends on what condition they are in, you see; there is a whole lot in that. If

(Deposition of Peter J. Slaughter.)

you are just starting the fermentation, the cooler would hold them, but if they are in a very bad condition, it would not.

"Q. Then, Mr. Slaughter, if they had been fermented when they were put in there, there would be no necessity of freezing them afterward, would there?

"A. Why, it would, sir, only if, just as I say, if it has just got a slight ferment it will hold them, but if they are just simply bubbling over, they are ruined.

"Q. Then they are ruined when they go in there, and the freezing won't protect them?

"A. It would not protect them if in that condition.

"Q. Isn't it true that if you freeze these berries in barrels that the barrels will burst?

"A. If they are in a fermented condition.

"Q. Yes, if they go in there in a fermented condition?

"A. Just as I say, it depends on how much they are fermented; if it is just starting fermentation, the freezing will stop it, but if it has [247] been going on before, she is going to go up in the air.

"Q. Supposing it has been going on before, and she is put in there and frozen?

"A. It will blow their heads off.

"Q. Even freezing will not prevent their blowing their heads off?

"A. You could not check it, once gas has started in there, all through the barrel, you know.

(Deposition of Peter J. Slaughter.)

"Q. Did you ever see any of them do those things?

"A. I certainly did. We have had experience in several things—syrups, molasses—in the same way. Take a barrel when it is just starting to ferment, you can hold it, but when the fermentation has gone through that barrel, you just move it this way, and I will tell you that head will go up kiting.

"Q. Well, if those berries when taken to the cold-storage plant were in a fermented condition to the extent that you could hear them sizzling, some of the barrels blowing up,— A. Yes.

"Q. Would you consider those berries in good condition at that time?

"A. No, I would not; no, sir.

"Q. Would you consider that by putting them into cold storage, into a cold-storage plant in that condition, they could be preserved and taken care of?

"A. No, not in that condition.

"Q. They could not be protected?

"A. No, sir, they could not.

"Q. Regardless of whether the temperature rose again or not?

"A. Absolutely. My experience is when the gas is that far, why a quarter of a barrel of that stuff, when the gas is in that condition that you say, she will go over the top, just boil right up. Where there is a slight fermentation, you can hold it, you can stop it.

"Q. You didn't pay for the first two lots that you ordered? [248] A. No, sir.

(Deposition of Peter J. Slaughter.)

"Q. Do you know whether or not anybody else paid damages for them?

"A. I don't know a thing about it; I haven't heard anything about it until now.

"Q. You don't know whether there was any claim for damages made against the railroad company?

"A. I don't know a thing about it.

"Q. And you don't know whether or not the Railroad Company was negligent in refrigerating the cars, which caused this damage?

"A. That I could not say. You see I haven't seen a report on the icing, and could not tell you a thing about it.

"Q. All you know about it is that the two cars came in bad condition?

"A. When they arrived, yes, sir, absolutely.

"Q. You don't remember what temperature they were in at the time?

"A. No, I don't, offhand, no; but it seems to me that I did look in the top of the car, too, and there seemed to be plenty of ice in the car.

"Q. But you didn't test it?

"A. That I don't know; you know it could have been done here fifty miles out and stocked up, you know, that would not be any criterion.

"Q. Exactly true. And you can't say during the whole transit of two or three weeks what condition they were in?

"A. No, you see I could not tell on that.

"Q. What is the freezing point? A. Thirty.

"Q. Isn't it thirty-two?

(Deposition of Peter J. Slaughter.)

"A. Some say thirty-two and some say thirty.

"Q. Well, if they were put in there, then, at 32 degrees, if that is the freezing point, doesn't that freeze them? A. No, it don't freeze them.

"Q. It will not freeze them at freezing point?

"A. No, sir.

"Q. They ought to be kept a little lower, you think? A. Absolutely.

"Q. If you put storage berries in barrels and freeze them, say, 16 to 26, will they blow up and burst? [249]

"A. No, not if there is no fermentation going on.

"Q. Well, doesn't the freezing stop the fermentation?

A. Sure, they won't ferment there at all in that condition, if they are going in there right, if you hold up your temperature; but if you lower that temperature, or go one way or the other, the reaction, that will cause it.

"Q. Well, if they go in there in a bad condition, fermented condition, I believe you say that there would be no necessity of freezing them at all, there would be no good in freezing them at all?

"A. You mean to hold them?

"Q. Yes.

"A. No; the only way I would know in that case, that is my idea, would be to go into those barrels and just take about half of them out and get about as many again barrels, and hold them that way.

"Q. Do you know anything about the nature of this case, that we are trying, between Mr. Baker

(Deposition of Peter J. Slaughter.)

and the National Cold Storage and Ice Company, do you know what the issues are?

"A. No, I do not.

"Q. You don't know what he is suing them for, do you. A. No, I don't know anything about it.

"Q. Do you know whether or not the goods that you rejected were part of the goods now making up the issues in this lawsuit?

"A. No, I don't know that. All I know is just the questions you are asking me here; there has not been anything told me about it at all, I don't know anything about it.

"Q. Do you know what the market price of these loganberries in barrels was in July and August in Portland, in 1920?

"A. Well, as I say, we bought them at 17½.

"Q. I am asking you if you know what the price of them was in Portland, Oregon, during the months of July and August? A. No.

"Q. You don't know? [250]

"A. I could not tell you that offhand, no.

"Mr. BOOTHE.—That will be all.

"Redirect Examination by Mr. ELEY.

"Q. Mr. Slaughter, had you bought any fruit, such as raspberries, strawberries or loganberries, from Mr. Baker before this lot was contracted for?

"A. Oh, yes, I bought from him for a good many years.

"Q. Had you ever had any that came fermented or in bad condition, before? A. No.

(Deposition of Peter J. Slaughter.)

"Q. Have you bought any since that time?

"A. No, I have not.

"Q. You have not bought any fruits from him since? A. No, I have not.

"Q. Do you know the price of loganberries in the market at Chicago, in July and August, 1920?

"A. Well, I can practically tell you, they were asking 25 cents here, if I ain't mistaken, right at that time; of course I would not want to go on the stand and be sure of that point, but I think it was around twenty-five cents.

"Mr. ELEY.—That is all."

Testimony of J. R. Von Kesler, for Plaintiff.

J. R. VON KESLER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Von Kesler, where do you live?

A. Chicago, Illinois.

Q. And what is your business?

A. Food products and preservers' supplies, under the style of C. L. Jones & Company. [251]

Q. How much experience have you had in that line of business? A. About twelve years.

Q. And just state generally what that business consists of in the way of handling fruit such as is involved in this case.

A. We are recognized as leading distributors of

(Testimony of J. R. Von Kesler.)

cold pack fruits to the preserving fraternity; they look to us for supplies for their output.

Q. And you have offices in Chicago and elsewhere in the east?

A. Chicago, and Boston, Massachusetts.

Q. In your business do you have occasion to handle quantities of barreled loganberries?

A. Very large quantities.

Q. And what has been your experience in handling the products got out by H. A. Baker in the last few years? Have you handled those?

A. We have handled practically all of his output for the last twelve years and supplies from other sources as well.

Q. What experience, Mr. Von Kesler, have you had in observing the handling of fruit from the field into the cold-storage plants.

A. On various occasions I have traced the fruit from the field into the cold-storage plants. I find that the fruit, if it is picked in the forenoon as rule is transported about noon, towards one up to evening, and then put on boats and sent to Chicago and transferred by crates or trucks immediately into the cold-storage house.

Q. And that practice then, the fruit around Chicago,—the practice there—goes from the field to the cold-storage houses, and packed at or near the cold-storage plants, or is some packed at—?

A. Within a radius of possibly as far as two hundred miles it is accumulated there.

Q. It is brought in by what ways?

(Testimony of J. R. Von Kesler.)

A. By boat, without refrigeration.

Q. Is any of it brought in with trucks? [252]

A. Outside of the State of Illinois, at near-by points, it is also brought in in trucks.

Q. I think you have already indicated, perhaps not very definitely, the extent of your experience in handling barreled goods that have been placed in cold storage and then shipped east for disposition.

A. When barreled goods arrive we place them in cold storage, put them in the freezer, see that they are thoroughly chilled and have them placed in a temperature of from sixteen to twenty-six degrees later on and keep them in that temperature indefinitely. I find that they have kept them for three to four years in that room without any distress or deterioration of the quality.

Q. And your business has brought you in contact with cold-storage plants and the handling of barreled goods to what extent?

A. To the extent of inspecting the fruits on arrival there and placing them in the cold storage and re-inspecting them when leaving there, tracing them in the warehouses in the various degrees of temperatures and reselling them at deferred times.

Q. And I understand you to say that when fruit in pack, packed in barrels, is placed in cold-storage plants and kept at a temperature of from sixteen to— A. Twenty-six.

Q. Twenty-six, that provided the temperature is kept there it will hold them two years?

(Testimony of J. R. Von Kesler.)

A. We have a specific instance where goods were kept in the cold-storage houses for over three years at a temperature of twenty-four degrees and by chemists pronounced absolutely perfect.

Q. Now, suppose—is it the practice at times, also, when the fruit goes into the cold-storage plant to subject it to a lower temperature than sixteen in order to freeze it?

A. That is the established custom, to put it into a lower temperature of sixteen degrees temporarily.

Q. However, is that always done? [253]

A. As a rule it is done.

Q. In either event, whether the fruit is subjected to a temperature which will absolutely freeze it at the outset or whether it is put into a temperature and held at sixteen to twenty-six, I understand you to say that it will hold for two to three years, provided the temperature is kept there?

A. It will.

Q. If the product is frozen absolutely at the outset by a lower temperature, then what effect upon the fruit would be had if the temperature later, when the stuff was held in storage, fluctuated—well, perhaps raised to thirty or thirty-two for a short time, what effect would be had on the frozen goods?

A. The fruit will ferment.

Q. Well, how long a period would it require? Would the temperature have to be up to thirty-six to get a result of fermentation if the fruit had been frozen at the outset?

A. We find that when goods are moved from a

(Testimony of J. R. Von Kesler.)

cold-storage room where they had been in about twenty-six degrees and placed in an ordinary room, that inside of twenty-four hours or possibly forty-eight hours they will show signs of deterioration and in three or four days positive fermentation is in evidence.

Q. If, however, they were frozen solidly in the first place, subjected to a very low temperature and were then placed in a room such as you have described, how long would it require them to ferment?

A. It would make no difference.

Q. Now, what is the fact as to whether or not barreled goods of this general character are kept in storage in Chicago in any substantial quantities?

A. Chicago is the largest distributing centre in the United States for cold packed fruits. I dare say there is more kept at Chicago, year in and year out, than all the points in the United States put together. [254]

Q. And, Mr. Von Kesler, what have you to say as to the effect on the food value of barreled loganberries which have been placed in cold storage, held for a time at twenty-four to twenty-six degrees and remained there for six or eight or ten days, as the case may be—what is the effect upon the food value of that product as the result of that fermentation?

A. That fruit would be thoroughly fermented and unfit for human consumption.

Q. Has it any real, substantial sale value after that? A. None whatever.

(Testimony of J. R. Von Kesler.)

Q. Now, you were out here in the fall of—in the month of December, 1920?

A. The policy of our business—

Q. Just a minute; I say, you were out there, were you? A. Yes, I was.

Q. And what brought you here at that time?

A. The policy of our business is, my partner and myself, to visit our trade annually and that year was my year for making this trip.

Q. And while you were here in Portland in the fall of 1920, did you have occasion to see Mr. H. A. Baker? A. I did.

Q. Had you handled or undertaken to handle his Oregon pack for that year of 1920? A. We did.

Q. And while here did you have any conversation with either of the Reids about the condition of affairs as affecting this fruit in its plant?

A. I did.

Q. Where did you meet Mr. Reid on that visit?

A. In his office at the National Ice and Cold Storage Company.

Q. Was that the time when the discussion was on between Mr. Baker and Mr. Reid which Mr. Boothe has referred to, looking toward some kind— [255]

A. Mr. Boothe was not present in his office.

Q. Mr. Boothe referred to it yesterday, however, in his examination of one witness. A. Yes, sir.

Q. That is the time when the discussion was on looking to a possible adjustment of this matter?

A. That was the time.

(Testimony of J. R. Von Kesler.)

Q. And did Mr. Reid at that time make any statement in your presence as to what was the cause of the difficulty?

A. Mr. Reid admitted at that time—

Q. Just what did he say; that is what I am getting at.

A. Mr. Reid stated at that time that the loss to the loganberries was due to the fact that he was required to use the juice to manufacture ice which he had contracted to supply. And owing to the excessively hot weather the juice was withdrawn from these rooms for a longer period of time than he had anticipated. He said when the juice was diverted he thought it would be re-directed inside of three days, but the hot spell lasted almost three weeks and he had not calculated upon such an extent of hot weather.

Q. Now, this discussion about undertaking to see what could be gotten out of the product in order to make the loss as light as possible, did that involve your having something to do with the matter?

A. It was suggested that we would try to salvage those goods.

Q. You mean by "we" your firm?

A. The firm of C. L. Jones & Company.

Q. And at that time did you have a notion that it might be possible to salvage some of the goods?

A. It was my personal opinion that if the fermentation had not gone too far they might have a low commercial value.

(Testimony of J. R. Von Kesler.)

Q. Well, nothing came of the proposed adjustment of the matter? A. Nothing. [256]

Q. And then did you later have Mr. Baker on his account undertake to follow up the plan of undertaking to salvage these goods and get what could be gotten out of them?

A. We made diligent effort to sell some of the fermented loganberries which were in Chicago, but could not do so because of their high state of fermentation, they were valueless.

Q. Mr. Von Kesler, what have you to say as to the demand in the market for loganberries in normal condition in the months of July and August or succeeding months of 1920?

A. The demand was greater than the supply; we could not get a sufficient quantity of loganberries to meet the requirements of our preserving trade.

Q. Your business—does your business bring you in touch with the demand in the country for such products?

A. We are looked forward to to supply the users of this fruit. We are recognized as the main source of supply of that kind of wares in the United States.

Q. And do the inquiries as to such products come to you in many instances?

A. By wire, by mail, and almost invariably when buyers are interested, even though at times they don't buy from us, they use us to check the quotations they have from other people.

Q. And you, as I understand you to say, there was a demand on the market for such products?

(Testimony of J. R. Von Kesler.)

A. There was a positive demand.

Q. Are you familiar with the market price of loganberries in barrels of the kind we are talking about here in normal condition in the months of July and August of 1920? A. I am.

Q. At Portland, Oregon?

A. At Portland, Oregon. [257]

Q. What was the price?

A. Loganberries—the source of supply of loganberries is recognized as Portland, Oregon. All quotations are made, are based on the Portland market. In fact, the loganberry price market is made here and we got quotations from Portland at seventeen and a half cents a pound f. o. b. cold storage here.

Q. And was there any change in that price during the succeeding months?

A. There was an advance in that price up to the last of the year.

Q. And that was f. o. b. Portland, Oregon?

A. F. O. B. cold storage, Portland, Oregon.

Q. Did you have occasion to observe any of these carload shipments of this same lot that went east?

A. I am called upon to examine every car of fruit that is shipped from here to Chicago, and I examined every car that came in, every car of loganberries. I examined them in the car and later on in the cold storage and directed their placing and being placed in proper temperature, such as first the freezer and later the sixteen to twenty-six room.

Q. And would you say that these 398 barrels of

(Testimony of J. R. Von Kesler.)

loganberries, assuming they were subjected to a temperature of thirty-six degrees for six or eight days and as a result of the chemical analysis they tested three per cent alcohol and developed a showing of acetic acid, that they had any market value in the fall of 1920 or any time since?

A. Positively not; jam made from that product would taste like vinegar.

Q. Mr. Von Kesler, the deposition of Mr. Slaughter, which was just read, referred to one car—there was a reference first to two shipments and then reference to three shipments, and as I read the testimony I understood the last shipment—the last lot referred to a car which he said arrived in good condition. Do you recall hearing that? Do you know where that car came from? [258]

A. I sold that car, I got that car out of California. It was necessary for me to try to get loganberries for these various people whom I had sold these loganberries to and could not deliver them on account of their fermented state, and I was able to find one car of loganberries on the Pacific Coast and bought same in California and paid seventeen and a half cents a pound f. o. b. California storage for that car and I had to apportion that among the various people and I could only give Mr. Slaughter fifty barrels.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Are you in the employ of Mr. Baker?

(Testimony of J. R. Von Kesler.)

A. I am not.

Q. Are you interested in any way in these berries?

A. None whatever, only as a broker.

Q. You have been with Mr. Baker a great deal during his trial of this case, have you not?

A. I have.

Q. You were with him all the time while we were in Chicago taking depositions, were you not?

A. I was.

Q. You were assisting him very materially in that behalf, were you not? A. Possibly.

Q. You took quite an interest in his behalf, did you not? A. As his broker I did.

Q. And when Mr. Theis was testifying in the case you were very much interested in the testimony that he put in, were you not?

A. Not in the nature of influencing Mr. Theis, but I was interested in the testimony of all.

Q. Isn't it a fact that when Mr. Theis was giving his evidence that you sat there nodding your head and shaking your head until the Referee, [259] Mr. Eley, had to tell you to quit?

A. No, sir, positively.

Mr. SPENCER.—There is nothing in the record of that sort; I think that part—

Mr. BOOTHE.—I know it is not in the record, but I want to ask if it is not true.

A. Positively not; it is a misstatement, a perversion of the truth.

Q. You say it is not true?

(Testimony of J. R. Von Kesler.)

A. Positively not.

Q. Were you not asked by Mr. Eley to sit in another place, where you would not sit so close to the witness, you were talking to him while he was testifying?

A. I don't even know to what that refers to, but I do not believe that had anything to do except that Mr. Eley wanted a direct view of Mr. Theis and I may have obstructed Mr. Eley's view.

Q. Weren't you talking to and whispering to the witness when he was testifying and correcting things, and Mr. Eley at my suggestion asked you to go away? A. No.

Q. Well, were you asked to remove your seat by Mr. Eley at all?

A. I don't recall that at all.

Q. When you were out here at Portland did you hunt Mr. Baker up or did he hunt you up?

A. I believe we met without any prearrangement. When I was out on the Coast I went to Seattle and my trip included everybody on the Pacific Coast as far as as San Pedro and I made it a point to visit all packers and intended and did go to Sumner factories. I represent Mr. Baker in other lines, particularly canned goods.

Q. Where did you meet him first on that trip? [260] A. In Portland, I think.

Q. Did he know in any way beforehand that you were going to be in Portland at that time?

A. I don't think he did.

(Testimony of J. R. Von Kesler.)

Q. Did you write to him, or have anybody write to him that you were going to be here at that time?

A. I expected to meet Mr. Baker in Los Angeles and had advised him that I expected to be there about the fifteenth of December.

Q. Did you tell him you were going to be in Portland?

A. I told him that I would start in at Seattle and work down the Coast.

Q. Did you tell him that you were going to be in Portland at a certain time? A. I did not.

Q. Do you know how he happened to be here at that time? A. I do not.

Q. Where did you meet him?

A. I believe Mr. Baker traced me through his factory; happened to know about when I left; wired to his factory to have me call or notify me that he was in Portland and to look him up. That might also have been done at Seattle, through his broker there.

Q. Did you look him up or did he look you up?

A. I naturally, under those conditions, would look him up.

Q. Where did you find him?

A. At the Benson Hotel.

Q. How did you happen to go with him over to the plant of the National Cold Storage & Ice Company?

A. I was interested in this loganberry proposivisit.
tion and at his invitation I accompanied him to the

(Testimony of J. R. Von Kesler.)

Q. You were interested in this loganberry proposition; what do you mean by that?

A. My shippers in Chicago were preparing actions to recover damages [261] and at that time tentative claims were filed with the railroad companies to recover this possible damage, but after the railroad companies had cleared themselves in one specific instance and in a second instance a suit has been dropped against the railroad company the case has been directed against the storage company. We sell goods f. o. b. Pacific cold storage, and we sold these loganberries f. o. b. Portland cold storage and our shippers are vitally interested in the quality of those goods.

Q. Now you have made that explanation, go along and explain about these actions begun. Was that before you saw Mr. Baker here and went over to Mr. Reid's place? A. What case?

Q. Against the Railroad Company?

A. A tentative claim was filed immediately on the arrival of the goods and after they were pronounced fermented the railroad inspector was called immediately, before the car was unloaded and the goods were unloaded in his presence, in the presence of the railroad inspector, the warehouse man, myself and the buyer.

Q. Now, let us get back to Portland.

A. Yes, sir.

Q. How did you happen to go with Mr. Baker over to Reid's plant, is what I want to find out.

Mr. SPENCER.—He has already answered that.

(Testimony of J. R. Von Kesler.)

A. I wasn't asked to be excused and I wasn't told that I wasn't welcome. It is customary for a broker and their principal to be together at all times.

Q. Now, I would like to know whether or not he invited you to go over there or whether you invited yourself to go with him?

A. I will say that that point was not discussed, and the opinion of neither was asked. [262]

Q. How did you happen to go with him over to the plant?

A. That was his path, or, rather, that was his movement and I accordingly came with him as part of it.

Q. You stayed right with him all the time, did you? A. I did.

Q. Now, did you examine those loganberries in the plant at the time you went over there with Mr. Baker?

A. I was in the room, but I did not examine them.

Q. Do you know whether or not they were in a damaged condition, from your own knowledge?

A. From my personal knowledge I know nothing about it.

Q. Had you been told that they had been fermented? A. I had.

Q. And you have stated, I believe, that when they are fermented once they are ruined?

A. They are.

(Testimony of J. R. Von Kesler.)

Q. Now, Mr. Von Kesler, acting upon that thing, as you knew that those berries were ruined, why did you want to get Mr. Reid to enter into an agreement—I believe you were interested in doing that—enter into an agreement to send those goods to C. L. Jones and Company to be sold and they would make up the difference between the price they would bring and seventeen and a half cents?

A. Mr. Reid had agreed to reimburse Mr. Baker for his loss and Mr. Baker said that he would not exact any profit and he said he was willing to settle upon a basis of sixteen cents a pound and it was suggested that C. L. Jones & Company would try to sell those goods for the best price obtainable and then a statement would be rendered to Mr. Reid showing Mr. Baker's loss, and Mr. Reid agreed to pay this loss.

Q. In other words, you wanted to get Reid to sign an agreement that they would guarantee Baker at least sixteen cents a pound for his berries? [263]

A. Less any possible salvage, yes, sir.

Q. And you knew at the same time, or from your information, that those berries were worthless?

A. The extent of the fermentation had not been positively determined on the quantity of goods which were in the warehouse, but the knowledge regarding the condition of the goods shipped to Chicago was established beyond a doubt.

(Testimony of J. R. Von Kesler.)

Q. Do you know whether or not there were some 231 barrels or thereabout in that cold-storage plant at that time that never had fermented?

A. That never had fermented?

Q. Yes, of these very berries we are talking about?

A. I never knew there was a barrel that was not fermented, because I had implored Mr. Baker and other buyers to give me loganberries to give to my trade.

Q. Did you and Mr. Baker, or did Mr. Baker at the time you were with him, make an effort to sell these goods here to see what he could get and ascertain what the damages were?

A. In Portland?

Q. Yes.

A. I did not; I am not allowed to sell in Portland.

Q. Do you know whether or not Mr. Baker tried or was trying at that time to dispose of these goods? A. I don't know.

Q. Do you not know as a fact that when we met at the Benson Hotel and had this conversation that Mr. Reid asked Mr. Baker how much his damages were and did he not say in words about to this effect: "Mr. Baker, if I have damaged your goods tell me what it is and I will pay you if I think it is right." Didn't he say that?

A. I don't recall those words, but Mr. Reid did say: "You go and sell those berries and I will pay the damages."

(Testimony of J. R. Von Kesler.)

Q. You say he said that at the Benson Hotel during that conversation? Now, isn't it a fact that his statement was: "Mr Baker, how much do you claim damages from me? Let me know and then I will see about paying [264] it, if I think I have damaged them?"

A. I don't recall that at all. It was a specific statement that he would reimburse Mr. Baker after the goods were salvaged, if there was any salvage in them.

Q. You knew Mr. Reid, Senior, took very little part in that conversation, do you not?

A. Mr. Reid, Senior, made the statement when we were about to depart, after you had told him, or after, rather, after you made the statement in the room that you advised him not to sign that agreement. Previous to that time Mr. Reid and his son had agreed and were in harmony to sign that agreement.

Q. Would you sign such an agreement as that, if you were in their place?

A. I would. It would brand me as a man of honor, after I made the statement and that agreement was to the effect that they would reimburse Mr. Baker for his actual loss due to their admitted contribution.

Q. Did not they at all times say that if they were liable for negligence or damage for the goods that they would pay for such damage as they had occasioned?

(Testimony of J. R. Von Kesler.)

A. They had acknowledged their negligence on several occasions and acknowledged their willingness to pay for that. The agreement was drawn up for the purpose of stating, or, rather, was drawn up for the purpose of having something of record in the event that either Mr. Baker or Mr. Reid would perchance die before the settlement were made and Mr. Reid made the statement: "There is my son, he is my heir, he will carry out this agreement and pay Mr. Baker."

Q. Who said that?

A. Mr. Reid, Senior, in your presence, Mr. Boothe.

Q. Where?

A. In the Benson Hotel, in our room.

Q. You positively state that that conversation was had? A. I am positive.

Mr. BOOTHE.—All right; that is all.

Witness excused.

Mr. SPENCER.—If your Honor pleases, that is our case. We rest.

COURT.—Defendants may proceed.

Plaintiff rests. [265]

Testimony of F. A. Kurtz, for Defendants.

F. A. KURTZ, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Kurtz, where do you reside?

(Testimony of F. A. Kurtz.)

A. Salem, Oregon.

Q. Did you reside there in the summer of 1920?

A. I did.

Q. In what business were you engaged there at that time? A. Canning and packing business.

Q. Did you own a canning plant up there?

A. I did, sir.

Q. Did you own the canning plant and packing plant where Mr. Baker was packing his goods at that time, his loganberries? A. I did.

Q. Did you see the packing going on there by Mr. Baker of those goods that were sent to the National Cold Storage and Ice Company?

A. I saw them what they were barreling the first two weeks of the season.

Q. How did they manage that barreling business?

A. Well, the berries were brought in over there from the fields dumped and pressed in barrels, headed up and sent away. Where they took them I do not know.

Q. How were they put into the barrels?

A. They were dumped in out of the crates and sometimes they kind of pressed them in—tampered them in, rather.

Q. With what? A. With a tamper.

Q. That was about two weeks of the time, you say?

A. Yes, the first two weeks of the berry season.

Q. Was he canning berries at the same time?

A. Not while I was there. Now, the last two

(Testimony of F. A. Kurtz.)

weeks of the season Mr. Baker [266] rented my cannery. I had finished all packing of loganberries that I cared to and he took complete charge of that and I went to the coast. I don't know what happened the last two weeks of the season.

Q. Do you know whether or not any of those berries that he canned there blew up?

A. I noticed some in the warehouse when I came back had blowed up and went all over the warehouse—canned berries.

Q. Do you know what was the cause of that?

A. Well, now, there can be various causes for canned goods to blow up. In lots of cases if berries are fermented and not properly sterilized in time they will blow up and then there is other causes. Defective lidding will cause them to blow up, where they take air. There are any number of causes in that way that cause a berry to blow up.

Q. Do you know anything about the trucking of these goods from Salem to Portland?

A. I know they were loaded on the autotrucks and taken away there. From what I know they were supposed to go to Portland.

Q. Had you had some experience in sending barreled goods in to Portland? A. Not that year.

Q. You had had some, had you?

A. I had experience last year.

Q. Last year? A. Yes, sir.

Q. They were packed in the same way, were they?

(Testimony of F. A. Kurtz.)

A. Yes, they were packed in the same way that Mr. Baker barreled his.

Q. What result did you have in shipping them in to Portland by truck?

A. The results I had—I was Manager last year of the Producer's Canning & Packing Company of Salem, Oregon—that is my old place, and for the company I barreled one hundred barrels. I shipped them in to the Union Meat Company cold storage here and the results that I had we lost them all.

Q. What was the cause of their being lost?

A. Well, the things blew up; they fermented.

[267]

Q. Were they good fresh berries when they were put in there?

A. They were just taken out of the field and put in the barrels, headed up and put on the Willamette Valley Transfer and sent in to the cold storage.

Q. Were they tamped in the same way as these berries of Mr. Baker were tamped in?

A. They were.

Q. Headed and barreled the same way?

A. Headed and barreled.

Q. To where did you say you sent them?

A. Union Meat Company's plant.

Q. They were sent out promptly after they were packed and barreled?

A. They were barreled along six in the evening and sent out somewhere eight or nine o'clock.

(Testimony of F. A. Kurtz.)

Q. You say they are fermented and blew up?

A. No, there was about thirty barrels of those that absolutely blew up and the rest of them fermented we had to—we did finally sell them at a very low market.

Q. Did they ferment before they got into the cold-storage plant?

A. The first we sent down Mr. Prentice called me on the phone and he said the berries were blowing up and I had my doubts about that blowing. I came down here and saw them myself, and while they were putting them in the cold storage—they loaded them in the evening and they didn't get into this cold storage until the next morning and when I came down there about nine o'clock they were just rolling some in the cold-storage room and while they were rolling them there was three barrels blew up in the hallway.

Q. Were those berries in substantially the same condition that Mr. Baker's were that he sent down to the National plant? A. I think they were.

Q. Were you aiming to follow the same plan?

A. Yes. In fact of the matter, I never saw a berry barreled before I saw Mr. Baker barrel his. [268]

Q. In Mr. Baker's packing were the barrels filled pretty full?

A. I think they were filled within about three or four inches of the top.

Mr. BOOTHE.—That is all.

(Testimony of F. A. Kurtz.)

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Kurtz, this canning plant that you had there, you say that Mr. Baker used it the last two weeks of the season?

A. The last half of the season; I think it would be approximately two weeks.

Q. About after the first of August?

A. Well, I could not say as to that, whether it ran clear into the first of August or not. When Mr. Baker rented it we agreed that he should take it the last half of the season.

Q. Now, you had a considerable quantity of canned goods that blew up that season, too?

A. I did, sir. Well, I didn't have them blow up in the warehouse, no, but I got swell bills later on.

Q. What does that mean, "swell bills"?

A. Well, take it, swell bills, a lot of times a can will bust and they call them swells, that is the buyers, and naturally the packer will have to reimburse them for those.

Q. What causes these swells?

A. Well, now, it is just like I say, some berries may have a little fermentation, might not be properly sterilized when they go into the can, may not be cooked enough.

Q. Some of them may not be canned properly?

A. Absolutely.

Q. Tops might not be put on properly?

A. Yes, sir, tops.

Q. And if the tops are not put on properly and

(Testimony of F. A. Kurtz.)

the swells develop and something is not done, what happens to the cans?

A. State the question again, please?

Q. I say, if the tops are not put on properly and they swell and then [269] no further attention is given to them, what happens to the can?

A. Well, they will burst up.

Q. They will blow up? A. Oh, yes.

Q. And that can be from defective canning or the placing of the tops, sealing or what not, as well as anything else?

A. Well, it can be laid to various things, now; it can be laid to bad tin plate put in the cans, if there is little pin holes they will sometimes take air and they will blow up. There are so many things you could lay that to I would hate to say.

Q. You would not undertake to say that was caused by a fermented condition of it?

A. There are so many things it would take a chemist in order to say what it was and I am not one.

Q. Mr. Baker simply took over your crew when he took your canning plant?

A. Well, he did, but the day he took it over I left; I don't know who worked for Mr. Baker after that.

Q. Your understanding was that he had the same canner you had?

A. I understand that he took him whether he kept him through the season I do not know.

Q. Your observation of the berries that season

(Testimony of F. A. Kurtz.)

of 1920 was that they seemed to be very good, average berries, wasn't it?

A. They seemed to me, yes.

Q. You saw nothing about the berries that would indicate any inferior quality that year at all?

A. No, I did not.

Q. Now, Mr. Kurtz, this experience that you had with one hundred barrels was your pack of last year? A. Yes.

Q. 1921. Was that the first packing you ever did?

A. That was the first packing I ever did myself.

Q. You had never done any packing before?

A. No.

Q. How did you get the berries in from the fields; did the growers bring the berries in to your plant? [270]

A. Some of them; some of them we got with our own truck.

Q. And some of them the growers brought in?

A. Yes. The berries were taken in one truck in the morning and brought in in the evening and throughout the day, rather.

Q. And those barrels would go into cold storage the next day?

A. Well, they would leave our warehouse there between eight and nine o'clock.

Q. How long were you engaged in that packing of one hundred barrels? A. Just two days.

Q. You just had a two day experience with the matter and then you quit, was that the idea?

(Testimony of F. A. Kurtz.)

A. Yes, sir.

Q. Well, have you tackled the packing of berries since? A. I have not, sir.

Q. You know that Mr. Baker had been packing berries for a good many years up there, don't you?

A. Yes, I heard of Mr. Baker packing there for I guess four or five seasons.

Mr. SPENCER.—That is all.

JUROR.—When those barrels came to the cold storage in bad order were they marked "bad order" on the receipts?

A. Where they came into the cold storage in bad order?

JUROR.—Yes.

A. You see the way we barreled the berries, we started in with number one and we kept a record of those barrels and the weight that was put in them, and when they came to the cold storage—well, I will tell you, the way I found it out, I followed the load down and saw them blow up and Mr. Prentice telephoned me he didn't know whether we could save any of them and we tried to salvage them and took the fermentation out of them, some of them, but they were sold at half price.

JUROR.—They didn't issue a receipt for them.

These others issued a receipt and marked "bad order" on those in bad order. [271]

A. We didn't get no receipt for those.

Mr. SPENCER.—Your experience was only two days and you didn't have time to get started?

A. No, we didn't have time to get started.

Witness excused.

Testimony of Wilbur P. Reid, for Defendants.

WILBUR P. REID, one of the defendants herein, called as a witness in behalf of defendants, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

You are one of the defendants in this case, are you? A. Yes.

Q. How long, Mr. Reid, have you been engaged in handling that cold storage plant?

A. I have had actual charge for five years, and formerly to that I have been connected with the company since 1909.

Q. You have stored a good many loganberries there and other berries for Mr. Baker, have you?

A. Yes.

Q. How long have you been storing goods for him? A. Three different seasons.

Q. Where is your plant located?

A. 309 East Washington Street, Portland.

Q. That is a pretty large plant, is it not? How much ground does it cover?

A. It covers one block.

Q. You manufacture ice as well as doing a cold storage business, do you? A. Yes.

Q. Manufacture and sell ice? A. Yes.

Q. What were the arrangements that were made between your company and Mr. Baker, if you know, regarding the storage and the price to be paid for these loganberries?

(Testimony of Wilbur P. Reid.)

A. The price arranged was to be more than quoted in 1919. We quoted a price of $1.15 per barrel for the first month and sixty-five cents for [272] each barrel thereafter for each month; that is for the season of 1920.

Q. Was there any understanding at any time as to what degree of temperature you should maintain in the storage of the goods?

A. No specific degree of temperature had been mentioned; I was to use my own judgment.

Q. Did Mr. Baker ever tell you that you should have a certain temperature?

A. No, he never did. Two or three years previous to that he had mentioned that he wanted it in a freezing condition.

Q. Now, Mr. Reid, you were present at the plant a great deal of the time when these goods were being brought in there, were you? A. Yes.

Q. Did you receive any of them yourself, personally?

A. I was there and saw quite a number come in.

Q. You were there during the daytime, were you?

A. Yes, and sometimes at night.

Q. Now, you may state to the jury what condition those berries were in when they were brought there on trucks, generally.

A. The condition of the barrels and contents were that ten per cent of the barrels received were showing signs of distress by leaking, sizzling, and some of the heads were off entirely, and some of the contents had been thrown out by bursting. They

(Testimony of Wilbur P. Reid.)

frothed and just boiled over and an additional fifteen per cent of the total number of barrels we had to put nail holes in the heads to relieve the pressure of gas to keep them from blowing up. I would say that twenty-five per cent of the total number of barrels during 1920 showed signs of distress upon arrival. The balance were in good condition.

Q. Now, you remember that letter that was produced here, you were instructed by Mr. Baker you were to take a six or eight penny nail and make holes in the barrels? A. Yes, sir.

Q. Did you do according to his instructions in that particular? A. Yes, we did. [273]

Q. And were those barrels that were fermenting and sizzling, as you say, treated in that way?

A. Yes, sir.

Q. Did you notify Mr. Baker that the goods were coming in in that condition?

A. I wrote a letter about that question.

Q. Now, in some of the receipts that were given they were noted "Bad condition"; some of those receipts which were brought in by the drivers who testified yesterday. Did you note on the receipts in those other instances where the barrels were merely fermenting or sizzling?

A. There was just a few receipts that had damaged condition noted on the receipt. We have a record—the foreman has a record of all barrels and numbers as receipted, and the condition, and there are numerous ones, some days there is one

(Testimony of Wilbur P. Reid.)

right after the other on that list showing blowing and damage and leaking.

Q. Now, when those goods were brought there how long were they on the platform or the aisle before they were put into the freezer?

A. In the day time they were put in immediately, kept them rolling, and we had to check every barrel and number, with gross, tare and net; have to make all those records, that took us a little time. The elevator that goes to the basement carries four barrels and it takes a little time for those four barrels to go down, unload and come up and get four more; and at night our night foreman there would know of these coming in; he had other duties, he was foreman over the tank crew for supplying the ice, he was foreman for icing the cars for the Pacific Fruit and Express Company and at all times he was ready to leave his work whenever the arrivals of the barrels and the trucks. He would roll them in and just as soon as one delivery was in he would start to move that to the elevator and down into the basement at night.

Q. They were put in with prompt dispatch, were they? A. Prompt dispatch; yes, sir.

Q. Were they allowed to remain in the aisle for any length of time, any [274] unnecessary time?

A. No, sir, no unusual delay. I would mention that quite a number of the barrels could not be rolled. It was customary to roll the barrels down the aisle and on to the elevator, but there was quite a number could not be rolled, they were in such a

(Testimony of Wilbur P. Reid.)

dangerous condition—fermenting and gas pressure, and was apt to blow the barrels up. It would be exceedingly dangerous to even put one's head near the head of the barrel, it might explode and blow up. We always cautioned the men to keep on the side where the staves were in rolling the barrel as a precaution.

Q. Did any of them blow up there?

A. Yes, sir.

Q. How many of them blew up, if you remember?

A. Well, I may say a total of fifty in the season blew up the heads.

Q. Blew the heads off? A. Yes, sir.

Q. Well, how many were there checked in that exploded and the barrels burst open and exploded there?

COURT.—You mean before they were put in the cold storage?

Q. Before they were put in the freezer.

A. I can give you two or three specific instances; one instance was that there was a truckload of barrels coming in down East Washington Street and at First Street there is an intersection of the Southern Pacific tracks and the tracks are on a little rise and vibrates the load a little bit and there was three blown up there.

COURT.—Were you there when they blew up?

A. I have the report of that.

Mr. SPENCER.—I move that be stricken out.

COURT.—Just what you know yourself.

Q. Just what you know.

(Testimony of Wilbur P. Reid.)

A. This is what I do know, and I have seen, standing on the platform, the loads back up and unload and I have seen several blow up actually there in the daytime.

Q. That you have seen yourself? [275]

A. Yes, I have seen that, yes, and the contents were just like a gravy. You could not see any form of a berry, just a pulp, a mass, and that would bubble and roll right over and go right over the edge of the barrels and on to the platform floor and also on the beds of the trucks.

Q. Now, those that you are speaking about, that blew up on the railroad track there, did you see the muss afterwards, or did you see any part of it yourself after you were down?

A. That is from the report that I have; I did not see that.

Q. You don't testify that you saw that?

A. No.

Q. Very well, we will just pass that and let somebody else speak of that.

A. And inside the aisle—alongside the platform there is a unit room there, an aisle to receive stuff there and the ones that were exploding they have evidence, I have seen stuff on the ceiling—such power of the gas—it is a twelve foot ceiling from the floor and this loganberry juice and pulp would fly all over; I have seen that actually.

Q. Now, Mr. Reid, those berries coming in in a fermenting condition that way, what did you do with them?

(Testimony of Wilbur P. Reid.)

A. We took all barrels as they came in as they were; damaged ones, some partially so and some good barrels; we noted on our storage receipt a few. There was a great many that the foreman just checked on his record that will be brought in evidence later. Our record of the damaged berries, the barrels as they came in.

Q. Now, where did you put them?

A. Put the record or the—

Q. Where did you put the berries?

A. We had to end those up and we trucked those into the basement in the same room.

Q. You put—go ahead.

A. We took care of those just the same as the others in the same room. We could not leave them out in the aisle, could not leave them on the platform, could not leave them on the trucks. We did the best we could. [276] You know the broken barrels are much harder to handle; a broken and damaged barrel will take three times as long to handle it as one in good condition.

Q. Well, did you put them in the freezer?

A. Yes, sir.

Q. How low a temperature did you give them at first? A. We gave them twenty-six degrees.

Q. And did this temperature stop the fermentation?

A. It slowed down the fermentation slowly. It takes considerable time to stop the fermentation; at the end of ten days to two weeks, sometimes longer. It takes that long at least to stop the fer-

(Testimony of Wilbur P. Reid.)

mentation throughout the barrel. The first cold will stop the fermentation around on the edge, on the inside of the barrel, and the third day, and it keeps working to the center and the center is the very hardest to stop; that will keep working away and form alcohol.

Q. To what length of time was it that these 398 barrels you have spoken of here were coming in to the plant?

A. The lot of 398 came in at various times. Quite a number of those were leftovers; that is, we were shipping out carloads and frequently we would come to a damaged one, that had been damaged and fermenting when they came in. We had to keep those there in the basement and retain them. And a great many of these 398 are those.

Q. About how many are there left there that you speak of in this lot?

A. Well, I would say about 140.

Q. That was the accumulation during the season, was it?

A. Yes, that was the worst ones that we could not ship.

Q. Now, you have heard Mr. Baker's statement here regarding the temperature going up to thirty-six degrees, something of that kind. Now you state to the jury what happened at that time.

A. Why, up to the last of July our records show that the room was twenty-six and twenty-seven degrees. And things were in very good shape in the basement. A little bit later, about the fourth of

(Testimony of Wilbur P. Reid.)

August, we used [277] our best judgment to equalize the total ammonia pressure between the ice and cold storage. After all those barrels were frozen at twenty-six and twenty-seven, we were sure that it would not damage those loganberries to put them up a few degrees higher temperature, and the sixteenth and seventeenth of August the temperature had got gradually up to thirty-six degrees. That is the time Mr. Baker and I went in the basement. Mr. Baker is right when he states thirty-six degrees. We don't deny that. But, however, that was only one day at thirty-six. Previous to that it had been colder and since that day it was colder. When he stated thirty-six degrees that is the very one day that it was the warmest. Now, the subject has been brought up that we were short of ice. Now, at that time we were right in the middle of the ice season and we had two units of power for compressing and both were working full power —full capacity and we took some off the ice tanks and put down to the basement to bring that temperature down and some times *vice versa;* we would take a little off the cold storage for the ice; but at no time did I think that that would damage the goods, because they were in a frozen state to begin with.

Q. Well, now, then, during those few days that the temperature went up a little bit, as you say, did some of these goods ferment and when Mr. Baker was there were some of those goods fermenting?

(Testimony of Wilbur P. Reid.)

A. I would say that Mr. Baker and I were there in the basement on the seventeenth of August; that a portion of them, I would say that sixty-five per cent of the total number of barrels were leaking or little signs of juice coming out, but not to any great extent. Mr. Baker went in there and held up his hands and says: "That makes me sick," or something like that, and I said, "That is not very bad, it has only been this way for just a day." I said, "You are excited; we have had this freezing in here right along and I don't think they are damaged."

Q. Now, what can you say as to what portion of those goods were fermenting at that time, whether or not they were those that were fermenting [278] when they went into the plant or those that were not fermenting when they went into the plant?

A. The barrels that showed bubbling and sizzling in the basement on the seventeenth were the ones that had gone in in a damaged condition, the heads blown off, or the ones that we put nail holes in. The centre of these barrels were the hardest to freezing, were the last to freeze in the barrel, and by putting a nail hole, by the instructions of Mr. Baker, to relieve this pressure, when they started to ferment again that is where the juice came, up through those holes; that is what made the appearance of everything going, but such is not the case. We had a great number of barrels there that went in in good condition and they were in good condition at that time, on the seventeenth, and they are in good condition to-day.

(Testimony of Wilbur P. Reid.)

Q. Were the heads made to bulge on account of the freezing?

A. Yes, sir. After Mr. Baker advised me to lower the temperature to twenty-four and twenty-six, the first instructions that he had given me about what temperature he wanted, that was along a little bit after the seventeenth of August and—that question again, I want to answer the question.

Q. (Read.)

A. Oh, yes. Why, during this freezing process of going back again into extreme cold, the barrels commenced to bulge and the heads broke by freezing, and a great number that were in fairly good condition on the seventeenth began to heave and break by freezing. I wrote Mr. Baker a letter, will I reduce the temperature, warm up the temperature from twenty-four or twenty-six to relieve this freezing.

Q. Did you have to put nail holes in the barrels when they were bulging on account of freezing to let the acid out? A. No, we didn't do that.

Q. You didn't do that?

A. At that time, no, that would not take care of the expansion. [279]

Q. Can you state how many of these 398 barrels were not fermenting on this sixteenth or seventeenth of August that you have spoken of.

A. Just a moment, I want to think.

Q. Maybe I am asking you something that you don't know.

A. I could not tell the exact number; it would be an estimate, on the seventeenth.

(Testimony of Wilbur P. Reid.)

Q. Well, was there as much as half of them then?

Mr. SPENCER.—I think if he knows; I don't think he ought to be speculating or guessing here about something he does not know.

A. I could not state the exact number; no, sir.

Q. Have those goods been kept in the freezer ever since that time?

A. Yes, sir, they have been kept at the temperature of twenty-four, twenty-six, since that date.

Q. And they are now at that temperature?

A. Yes, sir.

Q. What is the condition of those goods now?

A. The condition of those goods now are that—

Mr. SPENCER.—If he knows.

Q. Do you know?

A. Yes, I know. There are two hundred—about 213 barrels now that are merchantable; that are ready to ship.

Q. Did you make any test of those berries yourself, or assisted by any of the men?

A. I made a test myself by tasting and by observation of the color and any other test was made by a chemist.

Q. Did you cause any test to be made of a barrel, say, for instance, the worst fermented barrel?

A. Yes.

Q. What did you do? Tell the jury what you did about that.

A. The worst fermented one and one of the best ones we took off samples.

(Testimony of Wilbur P. Reid.)

Q. First of all, how did you do that? Where did you put them to thaw them out? [280]

A. We took the two barrels out of the freezing temperature, put them upstairs in a room of thirty-six degrees for a period of fifteen days and the heads were removed.

Q. Did they ferment?

A. They were exposed to the air and during that fifteen days they gradually thawed; and at no time did they ferment or show any signs of heaving or any movement.

Q. Now, what did you do with those two barrels, then, after you had opened the head?

A. We had them re-processed.

Q. Both of them?

A. Both of them, yes, and tests made; we have reports from a chemist.

Q. Do you know what the test is?

COURT.—The chemist will show that.

Q. You say that they re-processed both the good and the fermented one? A. Yes, sir.

Q. Well, how did they compare then, or did you make any comparison with them, then, of the others that had never fermented?

A. We took one barrel that had never fermented, one of the best barrels that we could find, and also one barrel that had fermented and was in bad shape by fermentation, and both were brought up to the standard of merchantable goods, by adding sugar and the process that they generally use.

Q. Did you assist in doing that? A. No, sir.

(Testimony of Wilbur P. Reid.)

Q. Now, these goods that were shipped to C. L. Jones & Company, I believe, and to Kasper and Durand, you remember about those, do you?

A. Yes.

Q. What condition were those goods in, so far as outward appearances were concerned, when they were shipped?

A. They were in good condition outwardly.

Q. Had they been well frozen before they were shipped? [281]

A. They had been frozen for several weeks.

Q. Were the barrels cleaned up?

A. Not washed, no.

Q. Not washed?

A. They were just the way they were when they were shipped out.

COURT.—What shipment were you referring to?

Mr. BOOTHE.—To C. L. Jones & Company.

Mr. SPENCER.—No shipment shown to C. L. Jones & Company; that is the name of the broker that makes the sales in Chicago.

Mr. BOOTHE.—Isn't that the name of the company Mr. Theis spoke about?

Mr. SPENCER.—That is Sexton & Company.

Mr. BOOTHE.—That is Sexton & Company. I beg your pardon, that is right, your Honor; I believe the shipment was made to John Sexton & Company; that was two hundred barrels, I believe.

COURT.—Shipped on the sixteenth of November as the shipping receipts show.

(Testimony of Wilbur P. Reid.)

Q. Now, will you state what condition those barrels were in when they were shipped?

A. We never shipped a barrel that was leaking or bad outward condition. We had a railroad checker from the railroad company right there when we were loading; every barrel was checked by the railroad checker and also by our foreman and if there was a barrel came up the elevator that was not suitable for loading, why, it was returned to the basement.

Q. Was Mr. Van Doran there?

A. Mr. Van Doran was there at the loading of one —I think he was at that time; at one particular time he was there by request by our letter we had written Van Doran.

Q. Those that went to Sexton & Company were frozen when they were taken out, you say?

A. Yes. [282]

Q. And were they put into a refrigerator-car?

A. Yes.

Q. Do you know what degree of temperature they had in the refrigerator-car?

A. No, I don't. In that connection I would say that the cars as they come in are re-iced and salted and they are pre-cooled as far as possible; we ice the cars before they are loaded and after they are loaded, if they need any additional ice and salt before they are pulled out of the plant on the siding, why, they are fully iced when they leave us. As far as the temperature inside the car, I do not know that.

(Testimony of Wilbur P. Reid.)

Q. Do you remember the shipments—the two shipments that went to Durand & Kaspar?

A. Not in particular. I followed the same instructions for all loading. All good barrels should go and those that were not should not go. We had, as I said before, a complete check, gross, tare and net and the number on each barrel recorded as it went into the car.

Q. Now, as to the time Mr. Baker had a conversation with you when he was wanting you to pay damages he claimed for those goods; you heard his statement of that fact. State what the conversation was, as you understand it.

A. Mr. Baker and I went together in the basement there on the seventeenth and he expressed that they were in poor condition and I didn't think that they were. He says "We would better go upstairs and talk with the other member of the company, William Reid." And so we went upstairs and found William Reid. And Mr. Baker said that the temperature was thirty-six and entirely higher than he wanted and I had some talk, I said something about the ice and had ice to supply the icing of the cars to the railroad; that I used my best judgment to take care of the barrels in the cold storage and also for the ice. I don't recall any further conversation at that [283] time. Mr. Baker left—left the office. And then later, the same day that we had a meeting at the Hotel Benson, Mr. Baker was over there at our office at that time and he told us, explained that he wanted us to guarantee a price of seventeen and

(Testimony of Wilbur P. Reid.)

a half cents; the difference, in other words, between what he would sell the loganberries in the Eastern market and the price of seventeen and a half cents; the difference he wanted us to guarantee him. I says, "Well, we will have to talk with the other member of the Company, Mr. William Reid," and so we did. But we did not agree to do any thing of the kind; we didn't say—I didn't say at any time that I would guarantee that seventeen and a half cents. I said before we would take it up further we wanted to take it up with our attorney, Mr. Boothe, and I suggested that we have a meeting somewhere. He said at the hotel and the meeting was arranged that evening at the Hotel Benson. Mr. Boothe was with us at the meeting, and at that meeting we didn't agree to guarantee Mr. Baker for the loss that he stated that was made at our plant on the temperature and all of that. Mr. Boothe stated that he would not agree to any such proposition and that was the end of the meeting.

Q. Now, during that conversation did your father speak of or say anything, ask Mr. Baker any questions? A. Yes.

Q. What did he say?

A. He said—he stood up, as I remember, and he made a gesture and he said, "Mr. Baker, if I owe you anything for damages tell me what it is; if we are in any way in fault," and, he says, "how much do I owe you?" and Mr. Baker says: "I don't know," and there was no settlement of any kind.

Q. That was the end of the meeting, wasn't it?

(Testimony of Wilbur P. Reid.)

A. That was the end of the meeting, yes. [284]

Q. Did you at any time tell him that if you had damaged his goods by any of your negligence, carelessness, you would pay for it? A. Never did.

Q. Now, were there any other goods of the same kind in cold storage at the time this temperature for one day went to thirty-six degrees? Were there any other goods of the same kind there that were not damaged?

A. Yes, we had another lot there. That was about the same condition as Mr. Baker's lot there was a portion of them that came in bad; fermenting; some of them showed signs of fermentation in very much the same condition that Mr. Baker's stuff. Some of that was in good condition at the time when it went out.

Q. And were there any other goods there that did not show signs of fermentation—goods of the same class?

A. No, I would say that stuff that went in in good condition, that it came out in good condition.

Q. All of it that had not fermented came in in good condition, did it? A. Yes.

Q. Didn't ferment when this temperature went up to thirty-six degrees for the day?

A. Didn't show any signs of fermentation. The good barrels that went in didn't show any added signs of fermentation.

Q. Now, the goods that were received were taken in some time by one man and some time by another; did you examine those receipts that were passed

(Testimony of Wilbur P. Reid.)

in yesterday and make some estimate as to the number of barrels that were received by certain parties? A. Yes.

Q. Just state, how many did Mr. Patton take in?

A. Yesterday I had the receipts for the Willamette Valley Transfer Company, they were on the desk there. I went over all the receipts. It is customary for our warehouse men to sign the receipt when the truck driver, whoever received the goods at our plant, and then the truck driver would retain that ticket showing the signature. Now, [285] yesterday I went over the list and there were three men that received all of the goods during *the* 1920 by truck. Our night foreman, Mr. Horne, Mr. William Horne, received 1113 barrels between six o'clock P. M. and six o'clock A. M. the next morning and six P. M. there was 607 barrels received at our cold storage.

COURT.—How many barrels during the night?

A. 1113. Mr. William Reid, Mr. E. L. Patton and Mr. O. L. Kennedy are the three men that signed for the goods in the day time. None of those three men signed for any goods at night.

COURT.—How many were received in the day, Mr. Reid?

A. 607; a total number of 1720.

Whereupon recess was taken to 2:00 o'clock P. M.

(Testimony of Wilbur P. Reid.)

Portland, Oregon, June 14, 1922,
2:00 P. M.

WILBUR P. REID resumes the stand.

Direct Examination (Continued).

(Questions by Mr. BOOTHE.)

Mr. Reid, you have stated something, generally, about the number of barrels in this lot of 398 which did not ferment during the time this temperature went up. Did you make some statement on that? Do you now recall how many barrels there were that didn't ferment?

A. I made a statement just before recess, the last answer I made. Did I refer to that again?

Q. I don't remember. I am asking this for my information; if I have asked you that and you have stated I don't care to state it again.

A. I have a record of 231 number one good barrels in the basement now, of that lot of 398.

Q. Now, of these that were in this damaged condition, as they say, were any of those holdovers, as you call them? [286]

A. Yes, they were some holdovers.

Q. The accumulation of shipments at different times, is that right? A. Yes, sir.

Q. Did you have conversations with the drivers at any time when they brought those goods in as to what length of time they took to bring the goods in?

Mr. SPENCER.—Now, I think the drivers were not confronted with such a statement.

(Testimony of Wilbur P. Reid.)

COURT.—I think that is correct.

Mr. SPENCER.—It is only fair to let the drivers know, I believe.

Mr. BOOTHE.—Well, we will leave that out, then.

Q. Now, have you any statement, then, as to how many barrels there are, then, that were blown and in a fermented condition?

A. I have 143 number two, with the heads splintered and nail holes in the heads and 24 barrels called number threes; heads out entirely, making a total of 398 for the number ones, twos and threes.

Q. When were those heads blown out?

A. Most of them before they went into storage; the majority, some of them were forced out when the freezing process, after the temperature went down after the seventeenth of August.

Q. Before you could get them frozen, then, some of the balance of them were forced out, is that it?

A. When they were re-frozen the contents expanded and forced out the heads that were formerly weakened.

Q. I think that is all the questions I have, unless you think of something yourself, Mr. Reid, that you want to state that I haven't gone over.

A. Well, there are other matters may come up on cross-examination.

Cross-examination. [287]

(Questions by Mr. SPENCER.)

Referring to this last subject that you have just

(Testimony of Wilbur P. Reid.)

mentioned, now, Mr. Reid, you say there are 231 of number one barrels?

A. Yes; 231 number one good barrels.

Q. And you have some list before you?

A. The list I have is marked on this sheet here, which is a record of barrels received; it is a memorandum from the foreman's record that he has furnished us in our office.

Q. Did you make up that list? A. I did not.

Q. And when you say there are 231 number one barrels, what do you mean by number one barrels?

A. Number one barrels are ones that show no signs of bursting and no signs of breaking the heads or the staves.

Q. I understand you to say that those barrels, ever since this occurrence in August, 1920, have been—when you got the temperature back down have been kept under refrigeration of twenty-four to twenty-six degrees? A. Yes, sir.

Q. You would not undertake to say from your own knowledge that those 231 barrels are absolutely unfermented stuff, would you?

A. I didn't say that they were not fermented.

Q. You call them number one barrels?

A. They are number one, ready to ship and merchantable.

Q. But as to the contents of those barrels you don't know anything about that at all, of your own knowledge, do you?

A. Not the exact test, no.

Q. And these number two barrels that you have

(Testimony of Wilbur P. Reid.)

classified here as number two, 142, what did they say was the matter with them?

A. I believe I stated that 123 had heads splintered and nail holes in the heads.

Q. Does your record there show when those heads were splintered and nail holes put in? [288]

A. Happened during the whole time, between the time of entry until to-day.

Q. And starting in the first of August, 1920, they have been in there two years, practically?

A. I would say that there had been none splintered or further damaged since August—about August 20, 1920; they are in the same state to-day as they were then.

Q. And the number three—you classify a third branch as number three barrels, 24 in number—

A. Yes, sir.

Q. And those you say the heads are out?

A. Heads are out.

Q. Are they out now? A. Yes.

Q. And when did the heads blow out on those? Does your record there show?

A. That happened during the entire time, from the time of coming in.

Q. Your record does not show when the heads went out on those? A. This record does not show.

Q. And your record does not show when the 123 so called number two barrels had their heads splintered? A. Not the exact time, no.

Q. So far as you are personally concerned you don't know any more about the contents of the

(Testimony of Wilbur P. Reid.)

barrels you call number one barrels than you do about the contents of the number two and number three barrels, from your own inspection?

A. When I say the barrels are graded in three different ways it is according to appearance and shipping condition of the barrels. They have to be re-coopered when moved.

Q. You don't undertake to grade the contents?

A. I don't grade the contents on that.

Q. Now, let us start back somewhat at the beginning of this thing. You say that when Mr. Baker made arrangements or started to ship barrels [289] in 1920, that no particular agreement was made as to temperature, or, rather, no particular request was made by him on you as to the temperature to be maintained. Well, you would not think it was necessary for Mr. Baker every year, when he started in down there storing barrels with you, to come around and name the particular temperature when you had been doing business the year prior, would you?

Q. Yes, I would expect that he would give us instructions, naturally.

Q. Well, you said that some two or three years earlier, I understood you to state that he had told you that he wanted those barrels put under freezing and kept under freezing, is that right? A. Yes.

Q. And he told you, didn't he, in the beginning, that he wanted the barrels always kept under a temperature which would be freezing?

A. Yes, in previous years.

(Testimony of Wilbur P. Reid.)

Q. Well, what is freezing, and what temperature is freezing?

A. Well, thirty-one, and any temperature colder than that.

Q. Well, with that understanding, or that request in previous years, do I understand you to say now that the matter of temperature was just left open, there was no understanding on your part at all as to what temperature should be maintained?

A. Well, I don't think there was any definite temperature mentioned.

Q. Then, you just ran whatever temperature you might please there, is that the idea?

A. Whatever in my judgment would hold the berries.

Q. You want us to understand, then, that, notwithstanding that previous arrangement with him and understanding with him, when he started to ship in 1920 you thought it was all right for you just to use your judgment? A. Yes, sir.

Q. And if you found what seemed to you a greater need for the juice on some other part of your plant, why, if your judgment told you to use it over there and let the storage-room go, it was all right to do [290] it; is that right?

A. It was hardly that way, no.

Q. What kind of temperature—

A. Whether the temperature I thought would hold the berries. I believed at all times that the berries would keep and not be damaged to any great extent.

(Testimony of Wilbur P. Reid.)

Q. He never told you that the berries would not be damaged if you allowed the temperature to go to thirty-six, did he? A. No.

Q. He told you in the beginning that he wanted the berries kept under freezing, didn't he?

A. In the beginning, along about 1918.

Q. Now, this rate of $1.15 a month covered freezing of those berries, didn't it? A. Yes, sir.

Q. But did you have a freezer-room over there at the time?

A. At that time we did not have a room upstairs; we put the barrels down in the basement.

Q. Have you got a freezing-room now?

A. Now, we have.

Q. A separate room? A. Yes.

Q. You had the berries in a separate room?

A. Yes, sir.

Q. To freeze them? A. Yes, sir.

Q. What degrees of temperature did you put them? A. Twenty-six.

Q. How long to hold them there, to freeze them solid, would it take?

A. Take about two or three weeks to freeze them solid, and even then you cannot drive it all the way through the barrel.

Q. Then you move them down, do you, to the other room? A. Yes.

Q. And what degree of temperature do you maintain there?

A. It is about the same temperature.

Q. What is the difference between the two rooms?

(Testimony of Wilbur P. Reid.)

A. Not a great deal in temperature.

Q. Why do you call one freezer and the other room—what do you call the other room downstairs, now? [291] A. That is a freezer.

Q. Well, don't you have some other name you apply to it? Isn't that the storage-room?

A. No, it is cold storage, freezer-room.

Q. Why do you run them into this room upstairs first, then, now?

A. Well, it is a little bit handier, it is on the first floor.

Q. Well, you have to move them downstairs sooner or later, don't you?

A. Not if we have small quantities.

Q. Well, when you are storing larger quantities.

A. We use the basement then.

Q. Do you run them in there first?

A. Sometimes we do, yes.

Q. Do you always do it?

A. It depends on how much space is available.

Q. And as a matter of fact you put your berries now in this freezer-room first of all?

A. During 1920 we didn't.

Q. You didn't have a freezer-room then; did you have a freezer-room in 1920?

A. Not on the first floor; freezer-room in the basement in 1920.

Q. Now you put your berries or whatever it is in the freezer-room first? A. Yes.

Q. On the first floor? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. And when it is thoroughly frozen you move it down to the big room, don't you?

A. At the present time.

Q. And as a matter of fact you subject the room you move into, the room upstairs, to a much lower temperature to freeze it? A. Yes.

Q. And how low do you run it down in order to get it thoroughly frozen? Sixteen, something like that? A. Yes, now it is sixteen.

Q. And you put it into the small room and thoroughly freeze it, we will say sixteen degrees, and when it is thoroughly frozen you move it downstairs to the big storage-room? A. Yes.

Q. And in the big storage-room if the temperature does vary a few degrees for a short time it doesn't make so much difference, because it is frozen solid through, isn't it? A. Yes. [292]

Q. Now, these barrels that you had there in 1920, you were moving into this large room downstairs new berries all the time, every day, weren't you?

A. Yes, sir.

Q. And that necessarily required—should have required a good deal closer attention to the temperature of the room, didn't it? A. Yes.

Q. Because the effect of moving in new berries in a refrigerator tends to run up the temperature in the big room, doesn't it? A. It does, yes.

Q. These—you have mentioned barrels, you gave some percentages there, ten per cent, you said, of barrels were bad and fifteen per cent you put nail holes in them to keep them. I didn't get from you

(Testimony of Wilbur P. Reid.)

Mr. Reid, a clear idea of when you claim that started, that ten per cent bad. Right at the beginning? A. Yes, upon arrival from the trucks.

Q. From the beginning of July, when the first shipments were made, you claim ten per cent of the barrels when received were bad?

A. I am saying that ten per cent of the total for the season came in in a damaged condition.

Q. I want to get what your idea is about the time on this thing. The shipments started here along in the early part of July, didn't they?

A. Yes.

Q. And is it your idea that, beginning right with the earliest shipments in July, that ten per cent of the barrels received were bad?

A. Not at first. The first part of the season the outside temperature was not as hot, the berries were firmer and we did have considerable good barrels; the average did not run as high.

Q. Let us get some idea, some definite idea, about what your notion is on that. When, then, did the ten per cent of berries bad on receipt begin? When did that commence?

A. Well, about the first of August. [293]

Q. Well, then for thirty days— A. Yes.

Q. For thirty days the berries that came in were in A-1 condition? A. During July.

Q. All in July. Now, as a matter of fact there were over thousand barrels of berries went in there in July; is that true?

A. Well, about that, I think.

(Testimony of Wilbur P. Reid.)

Q. Then this ten per cent bad started in along about the first, you claim, of August? It that right?

A. Well, we had some in July. I have a record of some that blew up in July.

Q. Well, how much—how many. I am trying to get at your idea when this receipt of ten per cent bad—

A. I am saying that the ten per cent is for the whole season.

Q. I want to get some idea of the time.

A. During July the percentage was not as high. We did have quite a number of barrels in poor condition come in in July, but the most of them, the greater portion of the fermenting and blowing up and heads off and all of that came in the month of August.

Q. When did this ten per cent, when the berries that you received, the July shipments of berries, begin to run ten per cent bad on receipt?

A. Well, about the first of August.

Q. Would you be sure it was the first, or three or four days each way, three or four days earlier or three or four days later?

A. Well, in looking over the records, along the first part of August.

Q. First part of August; that is about as definite as you could make it, about the first week in August?

A. Yes, sir.

Q. And that situation, I suppose, is true as to the fifteen per cent that you say you had to put nail holes in, is it not? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. That started in during the first week of August. Now, you say [294] that prior to that time there were some that came in bad?

A. Yes, sir.

Q. Were bad when they were received?

A. Yes.

Q. Well, Mr. Baker had written to you on the fifteenth of July that—I am referring now to Plaintiff's Exhibit 3, saying, "We are storing barrels with you and wish you would wire this office at any time any of the barrels show distress." Did you ever wire Mr. Baker with reference to a single barrel that showed distress?

A. I didn't wire, but I wrote a letter.

Q. When did you write a letter? Have you the letter? A. The letter is right there, yes.

Q. Is it the letter of August ninth?

A. Yes, sir, that is the one; yes, August ninth.

Q. You are now referring to Defendant's Exhibit "D" for Identification?

A. That is the one, about the fifty barrels.

Q. Referring to the fifty barrels? A. Yes.

Q. That is the first letter you wrote Mr. Baker about distressed barrels? A. Yes.

Q. And yet you say now that prior to August first, in the month of July, that at various times there were distressed barrels coming in, barrels that were in bad condition when you got them there?

A. I do, yes. They were in bad condition came in right along.

Q. Yet you didn't notify Mr. Baker about it?

(Testimony of Wilbur P. Reid.)

A. No.

Q. Either by wire or letter until this letter of August ninth?

A. There would be a continual wire all the time if I had.

Q. You could have wired Mr. Baker at his expense, couldn't you?

A. By writing a letter he knows the condition. We have had barrels other years and they were blowing up then, too.

Q. He said in this letter, again: "Should any of them commence to bulge at the head take a six or eight penny-nail, drive it through the [295] head three or four times, withdrawing it and allowing the gas to escape—and at all times notifying me and Van Doran." Now, did you notify Mr. Baker about any of these barrels prior to the letter which you wrote on August ninth?

A. No, and didn't wire. I followed the instructions about the nail holes, to prevent—so the barrels would not blow up with the gas accumulated.

Q. You realized this was Mr. Baker's property, didn't you?

A. We were taking care of his property, yes. Yes, I will answer that.

Q. And you realize that Mr. Baker had probably more interest in this property than any other man in the world, and yet you didn't wire him and did not notify him, although you now say that barrels were coming in there showing distress prior to your letter of August ninth? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. You referred in your testimony this morning, Mr. Reid, to some book record that was kept showing the bad order of the barrels when received?

A. Yes, that book record.

Q. Did you keep that?

A. No, but our foreman, Mr. A. L. Patton, kept that.

Q. And Mr. Patton you say wasn't there at night?

A. He was there during the day and checked over every barrel himself.

Q. And who made up the receipts which were issued to the truck drivers as they brought the loads in? A. Four different men.

Q. And you have already mentioned the names of those men? A. Yes.

Q. The right man was Horne? A. Yes.

Q. And then when would these warehouse receipts which you mailed to Mr. Baker be made up.

A. They were made up during the day.

Q. That would be the next day. A. Yes.

Q. The day following the receipt?

A. The barrels that came in at night were rolled into the basement and left in the centre of the basement and Mr. Patton in the morning would go down and check over every barrel, according to the condition [296] of the barrel, and the weights, and he would report to the office and the warehouse receipts issued for so many barrels each day.

Q. Now, for example, in Plaintiff's Exhibit 2, I just selected one here, July 20, 1920, is a receipt

(Testimony of Wilbur P. Reid.)

received by H. A. Baker, 116 barrels loganberries, lot No. 8903; that is signed National Cold Storage & Ice Company by E. L. Patton, and would represent, as I understand, the accumulation of barrels during the previous—

A. Previous night?

Q. —night, and the next morning, for example, on the night of July 19th, this being dated July 20—on the night of July 19th these barrels would all have been accumulated there and the next—on the morning of the 20th, Mr. Patton would go down and look them over and count them up and enter the total number on this warehouse receipt and then that would be mailed to Mr. Baker?

A. Yes, sir.

Q. And that was the course that was followed from the beginning of the season, which, according to this receipt, started July 8, 1920 and ended on August 19, 1920?

A. Yes. Now, I might add that Mr. Horne, the night man, stayed until six in the morning; Mr. Patton goes on at six and they interchange at the same time. If anything unusual, anything happens, any number of barrels showed distress, he told Mr. Patton right there all that went on that night and Mr. Patton would write out the written warehouse receipt the next morning.

Q. But day by day these were made out and mailed to Mr. Baker? A. Yes.

Q. Now, was it your practice down there to head

(Testimony of Wilbur P. Reid.)

up barrels, do your own coopering on Mr. Baker's barrels? A. No, we didn't.

Q. Well, who did the work?

A. Why, they were taken as they were, all classes of barrels put into the basement, and when they accumulated, why, we wrote to Mr. Baker or Mr. Van Doren to send us a cooper down there. [297]

Q. Well, let us see now. The first letter you wrote to Mr. Baker about having any barrels fixed up was on August 9th; that is true, isn't it?

A. Yes; there had been some accumulation of barrels at that time, yes.

Q. Do you mean to say you allowed barrels to stand around there with no heads on them without notifying Mr. Baker or Mr. Van Doren?

A. They were frozen just the same.

Q. They were frozen just the same without the heads, without any cover?

A. The barrels would freeze the same without any heads; we took the barrels in as they were.

Q. How did you happen to notify Mr. Baker on August 9th that you had on hand now about fifty barrels that had blowed and as you had orders to ship these out you suggested that he send somebody down to re-cooper them; how did you happen to write that letter on August 9th?

A. They were not ready to ship out, we could not ship a barrel that did not have a head in it.

Q. Well, the point about it is that you had just gotten around to the time you wanted to ship those barrels and you could not very well ship them

(Testimony of Wilbur P. Reid.)

without heads, so you asked him to come down and re-cooper them; is that right?

A. Yes, that is right.

Q. I understood you to say in your direct examination that you maintained a temperature in that room of about twenty-four to twenty-six up to about the first of August? A. Yes.

Q. And I understood you to say that up to that time the basement—everything was fine down there?

A. Yes.

Q. The basement was clean? A. Yes.

Q. Any signs of bubbling barrels?

A. Some, yes.

Q. Some?

A. Some that had been immediately put in four or five days, that had been fermenting and put down, they didn't stop entirely from fermenting [298] for four or five days.

Q. Do you want the jury to understand when Mr. Baker came on the 31st of July there was bubbling on the tops of some of the barrels, the tops of the barrels were stained?

A. They were not bubbling, exactly, but the barrels would show where the heads were out, some damaged barrels.

Q. Mr. Baker went down into the cold room at that time, didn't he? A. Yes.

Q. Did you go with him?

A. I didn't go with him on the first of August.

Q. You didn't go with him at that time?

A. Not at that time; no, sir.

(Testimony of Wilbur P. Reid.)

Q. The 31st of July?

A. Thirty-first of July, I wasn't with him at that time.

Q. Well, now, I understood you to say that about on the fourth of August you had some use for your juice in other parts and you used your judgment and you began—you took the temperature, some of it, from the cold room, the room where the barrels were stored; that is true, isn't it? A. Yes.

Q. About the fourth of August that started?

A. Yes.

Q. And then I understood you to say that on the—when Mr. Baker came down there the second time—you remember the time he came on the last day of July, do you?

A. Well, that point is not quite clear; I have been thinking of that since I answered that question before. I was with Mr. Baker one time when we had only a few barrels and I think that that was in the early part of the season. I don't think I was with him on the thirty-first of July.

Q. You don't think you were with him on the thirty-first of July?

A. But there was one time I was. I was with him at the first part of the season. [299]

Q. You think that may have been still earlier in July? A. I think it was.

Q. But you were not with him on the thirty-first of July? A. I don't recall that.

Q. And then you were with him when he came down in August?

(Testimony of Wilbur P. Reid.)

A. August seventeenth I was with him.

Q. That is the time that you say that he said that it made him sick to see that?

A. Yes, I was with Mr. Baker at that time, yes.

Q. And that was the day you say that the temperature was thirty-six? A. Yes.

Q. And you say that just happened, that Mr. Baker dropped in the time the temperature got to thirty-six?

A. That was the day the temperature got the worst, yes.

Q. How did it happen, do you suppose, that Mr. Baker dropped in down there the day you say the temperature got the highest?

A. It just happened that way, with Mr. Baker, I guess.

Q. Now, your temperature had started up on the fourth of August, hadn't it?

A. Yes, fourth of August.

Q. And you are absolutely sure, are you, Mr. Reid, you have thought over it pretty much, you are absolutely sure?

A. There is a record there of the temperatures.

Q. I want to know about your visit with Mr. Baker; are you certain when Mr. Baker and you went down into the basement that the temperature was thirty-six?

A. Yes, we both looked at the thermometer at that time, on the seventeenth.

Q. You both looked at the thermometer, you and Mr. Baker? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. Did you talk about it?

A. He said, "That is entirely too warm."

Q. And it was thirty-six? A. Yes. [300]

Q. Now, you are not mistaken about being with Mr. Baker at that time, are you?

A. No, I am certain.

Q. He was there and you were there and you both looked at the thermometer? A. Yes, sir.

Q. And it was thirty-six?

A. That was the only one day that it was thirty-six. Previous to that and after that it was colder, as the temperature record will show.

Q. Now, Mr. Reid, suppose it should happen that Mr. Baker was down there on the 20th of August, then the same thing is true, isn't it, the temperature was thirty-six?

A. No, it wasn't; it would be whatever it was at that time.

Q. I want to be certain that you are certain that Mr. Baker and you together went down in the basement and the temperature was thirty-six as you looked at the thermometer.

A. Thirty-six on that one day, when we were there together, yes.

Q. Do you remember when Mr. Van Doren came down with Mr. Ireland? A. Yes.

Q. What was the temperature then?

A. Thirty-five.

Q. Thirty-five that day?

A. That was on the sixteenth.

(Testimony of Wilbur P. Reid.)

Q. Well, now, what is your present recollection as to the date when Mr. Baker was here? Isn't it a fact, Mr. Reid, that Mr. Baker was here on the 20th of August? Mr. Baker wasn't at your place at all on the sixteenth, the seventeenth, was he? A. Well, let's see—

Q. Mr. Van Doren and Ireland were there on the sixteenth, weren't they?

A. It might have been around the twentieth.

Q. Then you think that it was the twentieth? Mr. Baker has already testified he was down here on the twentieth and went down to your plant; you have no reason to dispute him on that, have you? You think that was the date? A. Yes.

Q. And the temperature that day was thirty-six; you say that the temperature on the sixteenth, when Van Doren and Ireland were down [301] there was thirty-five? A. Yes.

Q. Did you go down and look at the thermometer with Van Doren?

A. The day I mentioned it was thirty-six was when Baker and I was there together; if that was the twentieth that is the day.

Q. Mr. Baker said it was the twentieth.

A. And if I stated before it was the seventeenth I must correct that.

Q. That is all right.

A. It was the day we were there it was thirty-six.

Q. I don't care to trip you at all on that date, Mr. Reid; if it was the twentieth, and I think it

(Testimony of Wilbur P. Reid.)

was, let us agree it was the twentieth when Mr. Baker was here. A. On that day, yes.

Q. And Van Doren and Ireland had come down on the sixteenth? A. Yes.

Q. Do you recall receiving this telegram, Plaintiff's Exhibit 4, from Mr. Baker, where he said, "Van Doren wires me that temperature of room is up to thirty-six." This telegram is dated August sixteenth. "Van Doren wires me that temperature of room is up to thirty-six" and then so on. He says, "You know you will be liable for any loss at this temperature. Each barrel is worth about seventy dollars." Do you remember getting that?

A. I think I do, yes.

Q. It says, "I beg you to get the temperature down to twenty-six or lower." Then you may be mistaken, the temperature may have been thirty-six on this sixteenth of August, instead of thirty-five? At any rate it was around about that figure?

A. If you want the exact temperature from the records—

Q. I am asking you now. You have testified about what took place over there.

A. Well, on the seventeenth around thirty-six.

Q. Was that the temperature?

A. Thirty-five.

Q. So that the temperature was around thirty-five or thirty-six, then, on the sixteenth of August and it was thirty-six on the twentieth of August, wasn't it? A. Approximately yes; yes.

Q. Well, it didn't go down in the meantime, did

(Testimony of Wilbur P. Reid.)

it? You didn't run [302] it down to twenty-four or twenty-six between the sixteenth of August and the twentieth of August? A. No, I did not.

Q. Now, when did you get the temperature down to twenty-four or twenty-six again after the twentieth of August?

A. After receiving that telegram I immediately made special pressure on the ammonia and we brought it right from that time on; it kept gradually getting colder.

Q. How soon did you get it down to twenty-six?

A. Why, a degree or two each twelve hours.

Q. On the 25th of August you wrote Mr.—no, I beg your pardon.

A. I sent a wire a few days after that.

Q. On the 21st of August—21st day of August you sent a wire saying "Temperature basement now 27."

A. After receiving his message on the twentieth I made special effort to put the temperature colder, and after about twenty-four hours, why, we succeeded in getting the temperature down, as I stated in my wire to him.

Q. In order to do that you took the refrigerator off the ice tank? A. Yes.

Q. You had had the refrigeration on the ice tank during that time, hadn't you?

A. Yes; not entirely, but partially so.

Q. That is what caused this trouble, wasn't it?

A. Partially so, yes.

(Testimony of Wilbur P. Reid.)

Q. So that we have the situation then, where the temperature started up on the fourth of August, didn't it? A. Yes.

Q. Started to climb, and on the sixteenth of August it was hovering around thirty-six?

A. Thirty-five and thirty-six.

Q. And it was thirty-six on the 20th of August?

A. I believe so, yes.

Q. Then you started it down? A. Yes.

Q. And on the 21st of August you think you had it to twenty-one? [303]

A. No, not that cold; about twenty-seven.

Q. Twenty-seven, I should say; twenty-seven. A drop in temperature from thirty-six to twenty-seven would be about—I am not very good at subtraction, how many degrees would that be?

A. Difference between twenty-seven and thirty-six.

Q. Yes; is about seven degrees—nine degrees.

A. Is about nine degrees.

Q. Do you think you dropped the temperature that many degrees in twenty-four hours?

A. We did, yes.

Q. You could do that, could you?

A. Do that by special effort, yes.

Q. Then if you could do that by special effort on the twenty-first day of August, why didn't you use that same special effort when Mr. Baker wired you on the sixteenth of August, begging you to get the temperature down?

A. Well, each day as the temperature was

(Testimony of Wilbur P. Reid.)

dropping, I figured on bringing up the temperature, making it colder—or dropping the temperature, making it colder each day, and the demand for ice kept increasing and I was not able to do that. Just at the time when I would figure on putting special effort on to the cold-storage room there was an extra added demand for ice and each day I thought it would be the next day that we could get on that pressure.

Q. So you just kept putting it off and putting it off and the thing remained that way until you finally got it back by this special effort? That is right, isn't it? A. That is right.

Q. After this experience, which that telegram of August 21st indicated brought the temperature down to twenty-seven, when did the bubbling or sizzling or whatever took place there—when did that stop?

A. That didn't stop—Oh, it was more than a day there was some activity in the barrels. [304]

Q. More than a day; well, how long was it?

A. Well, two or three days before everything was entirely stopped.

Q. And then you had some figure here, some percentage, a sixty-five per cent—did I understand you to say that when Mr. Baker was there that about sixty-five per cent of the barrels were bubbling? A. No.

Q. That is after the temperature had gone up?

A. No, I didn't say that.

Q. You had a figure, sixty-five.

(Testimony of Wilbur P. Reid.)

A. I said sixty-five per cent of 398.

Q. Well, sixty-five per cent of 398 were bubbling. A. No, you haven't got that right.

Q. What is this sixty-five per cent?

A. Sixty-five per cent of the 398 are in poor condition, not ready for shipment.

Q. When was that?

A. That is at the present time.

Q. Well, what percentage of the barrels that were in the basement when Mr. Baker was there on the 20th of August were showing distress, all of the barrels that were there?

A. All of the barrels were not showing distress?

Q. I say what percentage?

A. Well, the percentage would be a little more than sixty-five per cent at that time.

Q. Well, what would it be?

A. Around about seventy-five per cent.

Q. About seventy-five per cent of the barrels on August 20th, when Mr. Baker was there, were showing distress? A. Yes.

Q. And then what did you do with those barrels after he went away? What did you do with the room?

A. After he went away the temperature was brought down colder.

Q. And then what happened?

A. And the floor was cleaned up and everything was just as stated in the telegram. [305]

Q. Well, then, didn't I understand you to say

(Testimony of Wilbur P. Reid.)

that when you froze that stuff the second time that the heads bulged from freezing?

A. Yes, on some of them.

Q. How soon did that happen?

A. Just as soon as the contents was frozen enough to expand and push up the heads; that would not happen immediately.

Q. Well, how long did that happen after you got the barrels frozen?

A. It would take several days to do that; it would take at least a week to do that.

Q. Let us start at the beginning of that; if you had the temperature down to twenty-seven degrees on the twenty-first of August, how soon do you think the bubbling would stop and the barrels be frozen?

A. The bubbling would stop within a day.

Q. And the barrels were frozen how soon?

A. It would take a week at least to freeze the contents so that you would stop the activity.

Q. And then how soon did the bulging of the heads start in? A. During that period of a week.

Q. During that period of a week; so that from the time—you say that a week, outside time, would cover the period in which that bulging of the head would develop? A. Yes, to a great extent.

Q. During the period of the week in which those barrels were frozen the second time?

A. And the harder and longer you freeze the more expansion until it is all frozen; be some blew up perhaps over the week's period.

(Testimony of Wilbur P. Reid.)

Q. Now, Mr. Reid, if that be true, why was it—if these barrels were in such bad condition when they were received by you—some you say that was bad in July and that there were some of them that were not bad, top fermented—claim has been made here that they were sizzling and bursting and so on, even in July? A. Yes, sir.

Q. Why didn't the heads bulge from freezing throughout the month [306] of July, in, say, a week's time after they were frozen, if they were in such a bad condition when you got them?

A. Well, I think there were some; we had some at all times that were doing that.

Q. Well, did you notify Mr. Baker about those?

A. No, not in particular.

Q. Now, according to your notion there are 213 barrels down there that are merchantable now, you said? A. Well, I made it 231.

Q. Was it 231? A. Yes.

Q. Well, I beg your pardon. You think they could be sold and command a price that normal loganberries packed in barrels would command; is that your idea?

A. Why, they would bring the merchantable price, if re-processed.

Q. If re-processed? A. Yes.

Q. Well, do you know anything—have you had any experience in re-processing fruit?

A. Yes, we had two of those barrels re-processed for a test.

Q. That is the extent of your experience in re-

(Testimony of Wilbur P. Reid.)

processing fruit, such as this, two barrels out of this lot? A. Yes.

Q. You have not been in the fruit business yourself, Mr. Reid? A. No.

Q. Have not engaged in buying or selling fruit?

A. No.

Q. Now, as a matter of fact, all of that stuff there, the 398 barrels, was offered for sale, wasn't it?

A. Yes. At any particular time, do you mean?

Q. Well, during the period I think the year of 1921. As a matter of fact it was offered for sale to pay the taxes on it, wasn't it? A. Yes, sir.

Q. The taxes were not paid and the public offering of that stuff was made to pay the taxes, wasn't it? A. Yes. [307]

Q. And you bought it in, didn't you?

A. Yes, sir.

Q. For the taxes? A. Yes, sir.

Q. And there wasn't anybody that had enough confidence in it to come and make a bid on it and buy it, was there, except yourselves?

A. Well, the idea we bought it in in order to protect ourselves, as well as Mr. Baker.

Q. Well, was there anybody that offered any more money than you did?

A. Not at that time, no.

Q. How much did you bid it in for? About eleven hundred dollars, wasn't that the taxes?

A. I think so, yes, approximately.

Q. You bid it in for the taxes?

(Testimony of Wilbur P. Reid.)

A. We wrote a letter to the effect that we didn't want the goods, we merely bid it in to protect Mr. Baker, so that no outsider would get hold of it.

Q. Mr. Baker didn't ask you to bid and to protect him, did he? A. No, he didn't.

Q. And the goods were subject to sale for whatever they might bring on the market, weren't they?

A. At the tax sale.

Q. And nobody bid against you, did they?

A. No.

Q. These barrels, Mr. Reid, that were shipped to John Sexton & Company, I understood you to say that they were in good condition?

A. Good shipping condition, yes.

Q. You remember the shipment, do you? The shipment to John Sexton & Company? It is the one covered by the first deposition. A. Yes, I do.

Q. And do I understand you to say that the barrels were in number one condition?

A. The barrels were in number one condition, yes, shipping order. [308]

Q. And were there any nail holes in the barrels? A. All been plugged up.

Q. Did they bubble? A. No, sir.

Q. Were there any stains on the barrel?

A. Some stains, yes.

Q. To such an extent that the railroad company made a notation on the bill of lading that there were stains on the barrels?

A. It might have been the surrounding barrels

(Testimony of Wilbur P. Reid.)

that put the juice on the floor and when they were rolled got stained.

Q. Might have been, and yet might have come from the same barrels, too, that is true, isn't it?

A. I hardly think it.

Q. You hardly think it, but you don't know but what the stains might have come from the same barrels?

A. Might have been from the nail holes, nail holes oozed up and then they were plugged up afterwards.

Q. If something oozed up through the nail holes the stains would come from the same barrels?

A. Not after they were plugged up.

Q. Not after they were plugged up, no, but before they were plugged up, showing that the barrels had been subject to some state of fermentation, prior? A. Yes, possibly.

Q. Who put the nail holes in those barrels?

A. Our foreman.

Q. And did you notify Mr. Baker when you put nail holes in the barrels?

A. No, we didn't notify every individual barrel, didn't think it was necessary. We were going according to his instructions about putting them in to save them from blowing up; that was a natural precaution. If you see a barrel about ready to blow up, why, follow the instructions of Mr. Baker and put a hole in it and relieve the pressure.

Q. Mr. Baker's instructions were to notify him at once, weren't they? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. And you didn't see fit to follow those instructions?

A. No, I didn't notify him at all times. [309]

Q. You didn't follow Mr. Baker's instructions until after the fourth day of August, 1920, did you?

A. No.

Q. You began to follow Mr. Baker's instructions when you began to let the temperature go up, didn't you?

A. What do you mean? Up or down? Colder or warmer?

Q. I mean warm; on the fourth day of August you began to let the temperature get warmer, didn't you? A. Yes.

Q. And on the ninth day of August for the first time you wrote a letter to Mr. Baker about bad order barrels, didn't you? A. Yes.

Q. And then there was considerable notice to Mr. Baker, especially about the sixteenth or twentieth of August, when the temperature was hovering around thirty-six. At any rate Mr. Baker got down here, didn't he? A. Yes.

Q. And then was when you began to notify him, after you permitted the temperature to go to thirty-six; that is a fact, isn't it? A. Yes.

Mr. SPENCER.—That is all.

Redirect Examination.

Q. Mr. Reid, you have stated when this temperature went up; were you stating that from memory, or how? A. Yes, as I recall it.

(Testimony of Wilbur P. Reid.)

Q. I will ask you did you make a memorandum from your time-book at any time? A. Yes.

Q. Did you make that memorandum?

A. I made that myself, yes.

Q. Now, look at that and see if you have stated that from memory correctly?

Mr. SPENCER.—If anybody kept a time-book it would be very, very material.

COURT.—The man who kept the time-book.

A. The temperature?

COURT.—Yes. [310]

A. Our engineers.

Q. Now, you said something about there being sixty-five or seventy-five per cent of the berries that showed distress in some way or another—the barrels. I think you stated, too, that there were 231 barrels that were in good condition, didn't you?

A. Yes.

Q. What does that mean, that there are 231 barrels of these 398 barrels that have been in good condition all the time that are now in good condition?

A. They are in good order to ship and I believe that they are in as good shape now as they were in that time.

Q. What I want to know is whether or not any of these 231 barrels were fermenting at the time Mr. Baker was there looking at them, or do you know?

A. Well, I believe that some of them might have been.

Q. How many of them?

(Testimony of Wilbur P. Reid.)

A. Some of them might have been bubbling, and nail holes.

Q. Through the nail holes?

A. Some of these 231 have nail holes now and they were bubbling—some of them were bubbling at that time, when the temperature was thirty-six.

Mr. BOOTHE.—That is all.

JUROR.—What was the object in marking these shipping receipts "Bad order"; the receipts to the drivers?

A. Why, there was only a few receipts marked that way. They were coming in so numerous and so many, two and three on every truckload that were bad, and we put them right along together and all together into the freezer, but we didn't note on the driver's receipt or our receipt, cold-storage receipt, either form, we didn't note the condition of the barrels. We took them in just as they were, but our foreman has a record of their number, of every barrel [311] and the condition of each, showing the numbers that have blown out and leaking. We have that record, but that record was not furnished to Mr. Baker.

JUROR.—Now, the berries were received up until the nineteenth, weren't they, of August?

A. Up until about the eighteenth, I think, of August.

JUROR.—Well, the temperature in the room from the fourth—whatever came in the room from the fourth up to the eighteenth or nineteenth were not put into refrigeration at all in the warm room

(Testimony of Wilbur P. Reid.)

at thirty-six; you didn't freeze them?

A. No, not at that time, those that were put in.

JUROR.—Did you issue negotiable receipts outside of these ones to Mr. Baker?

A. Yes, we did.

JUROR.—Note in bad order or good order on them?

A. Nothing said about the condition.

JUROR.—Nothing said. So many barrels?

A. So many barrels. The barrels that he sold to other people were in our warehouse and the negotiable paper on them.

JUROR.—But they were all marked good order?

A. All were not marked good order anywhere, simply marked so many barrels in and out of storage.

JUROR.—Isn't there a custom to mark on receipts bad order to protect against loss?

A. I don't think so; it is not general, no.

JUROR.—If they came in bad order wasn't they receipted for as bad order?

A. I don't think it is general to do that. We have other commodities in there that we do not know the kind of contents or what shape it is in; it is barreled up and nailed up and we don't always have authority to open up the packages. We take them just as they are, one [312] box or one barrel. It doesn't signify, when we write out a receipt, that they are in good order.

JUROR.—All of those barrels of berries that

(Testimony of Wilbur P. Reid.)

were fermented, spoiled, were the identical berries that were delivered by Mr. Baker?

A. Yes, the barrels that went into our storage are the ones that went out, are the ones that were held—some were held over.

Q. You trace them by the numbers or date of their receipt?

A. Trace them by the numbers.

Q. These 398 barrels, now, they can be traced by date of receipt?

A. Except where they are blown out and the record on the head, where they are printed on, is destroyed, something like that.

Witness excused.

Testimony of Frank H. Pick, for Defendants.

FRANK H. PICK, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Pick, speak a little loud, so the jury can hear. There is a good deal of noise here. What is your business?

A. My business is food broker and canner.

Q. How long have you been engaged in that business? A. About five years.

Q. Have you been engaged in handling loganberries? A. Yes, sir.

Q. How long have you handled those?

A. About three years.

(Testimony of Frank H. Pick.)

Q. Buying and selling? A. Yes, sir.

Q. Have you had frequent opportunities of examining loganberries? A. Yes, sir.

Q. Have you had opportunity of observing the handling of loganberries hauled by trucks?

A. Yes, I have.

Q. In this case, Mr. Pick, it seems that the loganberries were packed [313] in barrels, fifty gallon barrels, I believe, at Salem, and hauled by trucks from Salem to Portland, and the time consumed in hauling them down was about three and a half or four hours. What would you say as to the effect this hauling of the berries that distance in that time would have upon them?

A. Well, the hauling it from Salem to Portland, of course, all depends on the weather when they were hauling these berries from Salem to Portland. Naturally if it was hot weather it would start fermentation. If they didn't have it on too long, held at Salem when they took the berries—

Q. Supposing the berries were put in barrels and tamped down with some weight—I don't say they were mashed down, but smoothed down, leveled down with some kind of a weight, would that have any tendency to cause them to ferment quicker?

A. Yes, if they were mashed—

Mr. SPENCER.—He didn't say mashed, just smoothed down, just smoothed.

A. Smoothed down. I don't know the condition of the berry, how the berry would—crush the berry, if they were shaken down. It all depends on the

(Testimony of Frank H. Pick.)

weather; if it was hot weather naturally it worked quicker to ferment the fruit.

Q. Have you seen these barrels of loganberries in the plant of the defendant?

A. Yes, sir, I did.

Q. State to the jury what you found there?

A. Well I found part of them in good condition; I found some that the heads were swollen.

Q. About what proportion, if you remember, were in good condition?

A. Well, sir, I don't know; I just forget the figures.

COURT.—You mean the barrels in good condition?

Q. Barrels; I am not speaking of the contents—goods. You didn't examine the goods at all, did you? [314]

A. No, I didn't examine the goods.

Q. You looked at the barrels and you are testifying so far as the barrels are concerned there were a certain number that you say looked to be in good condition? A. Yes.

Q. And you say there were a certain number with the heads off?

A. They were not off, but they were bulged.

Q. You didn't examine the goods yourself, did you? A. No, I did not.

Q. Now, Mr. Pick, suppose those goods when they were received by the cold storage company were fermenting, bubbling, sizzling, how long would it take,—putting them in a freezer, say, of twenty-

(Testimony of Frank H. Pick.)

six degrees to freeze them or stop the bubblings?

A. Well, ought to stop the bubbling in about two or three days, seventy-two hours. It all depends on the temperature that you put them into.

Q. Now, if they came to the plant, the cold-storage plant, fermenting to such an extent that you could hear them ozzing or sizzling, were those berries ruined at that time?

A. Well, they were not good; they were not in a marketable condition at the time, not if they were sizzling, working, fermentation on them.

Q. Now, supposing they are frozen, are they still marketable goods?

A. No, I don't think so, because after you took them out, why, the fermentation comes right back.

Q. Then if they are fermented before they are put in the cold storage you would say that they are not then marketable at all?

A. No, not if they were fermenting already; naturally nobody would want fermented berries.

Q. And suppose, now, Mr. Pick, that those loganberries, a part of them, at least, were in this fermenting condition when they were put into the cold-storage plant, frozen, and some two or three weeks after that the temperature should go up gradually to, say, for a day at thirty-six, and they should begin to ferment and sizzle again, [315] are they damaged any worse than they were in the first place? A. No.

Q. If they were damaged at all, then, you would say that the damage was the first fermentation?

(Testimony of Frank H. Pick.)

A. Absolutely.

Q. Have you had any experience with fermented goods of this kind?

A. Well, I did some, not very much; never have any experience, that is, to have berries go bad on me. I have had some, not from my own.

Q. What did you do with them when they got into that condition?

A. Well, we had to re-process them and sell them to preserve people for preserves.

Q. Did you get as good a price as—

A. No, because they are re-processed.

Q. They have a little value?

A. They have a little value, yes, but not the value they had when they were put in the barrel fresh.

Q. How did you re-process them?

A. By adding sugar; I should imagine that the berry, after you take them out to re-process them, you mash the berries.

Q. From your observation of the berries you saw in this plant, do you think they are totally destroyed?

A. No, I don't think they are totally destroyed.

Q. Do you know what loganberries were worth during the summer of 1920 in barrels.

A. Well, that I just could not say, what they were worth at that time.

Q. Was there any market here for them at that time?

A. Well, there was and there wasn't. I would

(Testimony of Frank H. Pick.)

not say that there was a very big market for them, no.

Mr. BOOTHE.—I think that is all.

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Pick, your experience has been that of a canner? A. Partly, yes, sir. [316]

Q. Have you packed loganberries?

A. Yes, sir.

Q. Where? A. Carver, Oregon.

Q. You have a packing plant there? A. Yes.

Q. How much packing have you done there?

A. Well, we haven't very much; packed last year, we have some packed last year and I had experience with the Standard Fruit Products, at Second and Alder.

Q. Last year was your first? A. Yes.

Q. And how many berries did you pack at Carver last year?

A. We didn't pack very many last year.

Q. How many?

A. We packed—oh, maybe a thousand or fifteen hundred cases of loganberries.

Q. A thousand or fifteen cases of loganberries; how many barrels would that be?

A. That is sixty pounds, be about sixty thousand pounds, would be about three hundred and fifty or four hundred pounds to the barrel.

Q. Be about a carload, wouldn't it?

A. Yes, just about.

(Testimony of Frank H. Pick.)

Q. And you are figuring on packing this year?

A. Yes, sir, packing right now.

Q. You pack at Carver? A. Yes, sir.

Q. Where is Carver?

A. Carver is just the other side of Clackamas, about sixteen miles from here.

Q. Now, counsel has asked you about the effect on these berries if they went into cold storage after being packed, if they went into cold storage in a feremnting condition, sizzling and bursting. Suppose they went into cold storage all right?

A. Yes.

Q. And they were subjected for a period of four or five, possibly six days of temperature above freezing, would that have any effect on them? [317]

A. You mean when they were put in in good condition?

Q. Suppose they were put in in good condition.

A. Well, if you put them in in good condition, if you run a temperature, naturally it will start your berries fermenting.

Q. And if the warm temperature happened to them after they were put in cold storage the same depreciation in value would occur just as you have testified might occur, if they were good in the first place?

A. If they were already fermenting the freezing would not do them much good.

Q. I am assuming they were not frozen. In the first place, suppose they were put in all right.

(Testimony of Frank H. Pick.)

A. I don't know whether they were put in all right.

Q. I am asking you to assume. You don't know whether they were all in bad condition, either.

A. No, only just what I have heard about it.

Q. Suppose you heard something else about it. Suppose you heard they were put in in good condition, suppose everybody who had anything to do with the handling, from the fellows who packed them, who brought them in in trucks, had the responsibility to look after them, all state as far as they were observed they went in in good condition, and, barring a few barrels, they were in good condition; and then a rise in temperature happened because the storage people let off—

A. A barrel might be working and you don't know anything about it.

Q. The working of the barrel of loganberries might be caused by some act of the cold-storage people. A. I don't know about that.

COURT.—He means after they were put in cold storage they take the frost off and let the temperature go to thirty-six and stay there.

A. That depends on how many days they leave it go at thirty-six. [318]

Q. You don't mean to let us understand that there is not anything the cold-storage people could do that would hurt the berries?

A. No, I don't think they want to hurt the berries, because you could keep your berries at thirty-six and they will keep.

(Testimony of Frank H. Pick.)

Q. It is not offered that anybody else wants to hurt the berries, either; the thing I am getting at, you are satisfied if the cold-storage people permit the berries to go into a warm room and stay four or five days, or a week, it is bound to result in the deterioration of those loganberries, provided they went in there all right.

A. I don't know what condition they went in.

Q. I am saying, assuming they went into—

A. —the packing-house all right.

Q. You have answered a question assuming they went in all wrong. Now, can you answer my question, assuming they were all right?

A. Assuming they were all wrong, they were all wrong.

Q. Assuming they were all right when they went in, they should come out all right. A. Yes.

Q. And if anything happened in the meantime about the only conclusion is that it happened through some act of the cold-storage people, is that right? A. Well, maybe so.

Mr. SPENCER.—That is all.

Redirect Examination.

Q. Now, suppose, then, the berries went in there in good condition, all right, and they were put in the freezer, twenty-six degrees, frozen, twenty-six degrees, kept there for some little time, say two weeks, something like that, and then suppose the temperature should gradually come up to as high as thirty-six degrees, running over a period, say, a week or ten days, should those berries under

(Testimony of Frank H. Pick.)

those conditions begin to ferment?

A. No, sometimes it takes a week or ten days before they start to melt.

Q. What?

A. It takes a week or ten days before they start to melt. It all [319] depends on the condition they are in before the hot temperature came in there. Frozen barrels of fruit, it takes a week, some time to melt, before it starts.

Q. And it would not hurt the berries, then, if they had a temperature—

Mr. SPENCER.—Suppose you let him testify.

Mr. BOOTHE.—I think he said it; I just want to repeat it, that is all.

Recross-examination.

Q. Mr. Pick, did you ever have any packed berries in cold storage?

A. Did I have any?

Q. Yes, other than the carload you had last year.

A. No, I have been selling the packed berries.

Q. Well, have you had experience in operating a cold-storage plant?

A. Why, no, I didn't have experience in operating a cold-storage plant; no.

Q. And your selling of loganberries, packed loganberries, has been over a period of how many years?

A. Been there for five years.

Mr. SPENCER.—I think that is all.

JUROR.—You said the bubbling of the barrels —now, is the bubbling of the barrel when they are

(Testimony of Frank H. Pick.)

rolled and handled, does that prove that fermentation has set in? If there wasn't any fermentation and a leak in the barrel, wouldn't they bubble?

A. Sometimes they would and sometimes they would not. If it is bad fermentation naturally you could hear the sizzling. A barrel might be fermenting right in the center of the barrel, you don't know anything about it. It might be all right to send it through, get at the other end, the destination, blow out.

JUROR.—What I was getting at, handling the berries, rolling them, if there was a leak wouldn't it bubble out through, the juice bubble?

A. Yes.

JUROR.—That is no sign it is fermenting? [320]

A. No, because they may not tip the barrels, get the heads down in order to get in the stuff. When they take the heads out the juice may come out.

JUROR.—What I want to know is, can you tell whether there was fermentation or not?

A. No, you could not tell.

Witness excused.

Testimony of E. L. Patton, for Defendants.

E. L. PATTON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Patton, what is your business?

(Testimony of E. L. Patton.)

A. Foreman, National Cold Storage.

Q. You will have to speak a little louder; it is quite noisy.

A. Foreman, National Cold Storage.

Q. How long have you been their foreman?

A. About eight years.

Q. And you were their foreman during the season of 1920, were you? A. Yes, sir.

Q. Did you have anything to do with the receiving of those goods that were sent in by Baker to this cold-storage plant? A. A part of them.

Q. What did you have to do with them?

A. I had to make out the storage receipt; get the number of the barrels and examine them.

Q. Did you receive any of the goods that were brought in by the truckmen?

A. Part of them, yes, sir.

Q. Do you recall or have any memory just now as to how many barrels you received?

A. I could not tell you exact; I suppose about one-third of them.

Q. Probably one-third? A. Yes, sir.

Q. Your hours of the day were from when to when? [321]

A. From six in the morning until six in the evening.

Q. And then those goods that you received were received during the daytime not later than six o'clock in the evening?

A. Yes, in the daytime.

Q. Now, you may state to the jury the condition

(Testimony of E. L. Patton.)

those barrels were in when you received them.

A. A part of them were all right; others were sizzling and showed some distress, but we tried to save every barrel that we could, even if they did show a little distress.

Q. When you received them what did you do with them?

A. We put them in our cold-room as quick as we possibly could, as soon as we could roll them down there.

Q. To what extent can you say the barrels were fermenting? A. I could not say.

Q. You could not say? A. No, sir.

Q. Could you hear them?

A. You could hear them once in a while; yes, sir.

Q. Did any of them blow up.

A. Quite often had some to blow up; yes, sir.

Q. Did any of them blow up during the daytime when you were there? A. Yes, sir.

Q. Do you remember how many blew up?

A. No, I could not; I could not tell you.

Q. What did you do when they blew up?

A. Why, they blowed their heads out.

Q. Did it blow the berries out? A. Yes, sir.

COURT.—He is asking about the condition be-before they went into the cold-storage room, or after that? A. Before and after also. [322]

COURT.—He is asking about the condition be-fore. A. Before?

Q. This is before, I am referring to now.

(Testimony of E. L. Patton.)

A. Yes, sir.

Q. Did you see any of them blow up before they went into the cold-storage room? A. Yes, sir.

Q. Do you remember about how many blew up?

A. I could not tell you. Almost every—that is, the latter part of the season get one or two a day.

COURT.—One or two a day? A. Yes, sir.

Q. Did you know anything about any blowing up on the track near the warehouse?

A. Only hearsay.

Q. You didn't see that?

A. No, sir, not until afterwards. I didn't see it blow up, no, sir.

Q. Did you see it after it had blown up?

A. I saw the effects of it; yes, sir.

Q. What did you see?

A. I saw loganberries lying on the street.

Q. Do you know how many barrels there were?

Mr. SPENCER.—That is pretty remote.

COURT.—Of course you would have to show that they were logan berries coming in from Baker; you would have to follow that up.

Q. Do you know what loganberries those were?

A. They were in the same load coming in from Mr. Baker.

Q. And was the balance of the load unloaded at your place? A. Yes.

Q. Do you know how many barrrels there were that blew up there before they came to the plant?

A. The driver told me there was one barrel blowed up.

(Testimony of E. L. Patton.)

Q. And you saw it lying on the ground?

A. Saw the contents of the barrel, yes, sir.

Q. Did you notice or observe whether or not any of those barrels you received had nail holes driven in them before they got to the plant?

A. None, no, sir.

Q. Now, when those barrels were received by you, how long before they were put into the cold storage or freezing-room? [323]

A. They were put into the cold room just as soon as we could check them off and roll them down into the basement.

Q. Then that would be immediately, would it?

A. Yes, sir.

Q. They were not allowed to lay around there, were they? A. No.

COURT.—How long does that take, Mr. Patton?

A. According to how many barrels that came in.

COURT.—Of course.

A. But ordinarily it would be not more than an hour.

Q. If two or three barrels, then, came in at one time it would only be a few minutes until they were down in the cold room?

A. Only be a few minutes until they were down in the basement, yes.

Q. Were those barrels numbered?

A. Yes, sir.

Q. In consecutive order? A. Yes, sir.

(Testimony of E. L. Patton.)

Q. Did they come in to your place in the same consecutive order? A. Not always.

Q. What did you observe about that?

A. I have my memorandum here of that. If a load was delayed any I could easily tell by the numbers of the barrels that came in, as they ought to come in by rotation.

Q. Have you any reference on that subject that you can look at in your book that tells about it?

A. Yes, sir.

Q. What is it; just turn to your book.

A. I have one instance here where there were two barrels delayed in coming in; should have come in on the eighteenth and they didn't come in until the nineteenth. I also—

Q. How do you know they should have come in on the eighteenth? A. By the numbers.

Q. As compared with the others that were coming in?

A. As compared with the others that were coming in at that time, yes, sir. Each barrel is numbered and I would copy down the numbers from the barrels and when a barrel didn't come in on time, why, I made a [324] notation of it. Also there was on the twenty-first—

Mr. SPENCER.—What was the—

A. On the twenty-first there should have been ten barrels; eight barrels came in on the twenty-first.

Q. How many?

A. Eight. They were delayed one day, came in

(Testimony of E. L. Patton.)

on the twenty-second. And every once in awhile there would be a barrel delayed in coming in, would not come in until the next day.

Q. Does that book you have there show the number of each barrel that came into the plant for Baker? A. Yes, sir.

JUROR.—Were those barrels marked in bad order, those delayed barrels?

A. No, they were not marked in bad order, but we could not tell exactly whether in bad order or not unless the head was splintered, or something of that sort.

JUROR.—Was the head split?

A. The ones that were delayed?

JUROR.—Yes.

A. No, sir, not that I know of, but they might have been fermenting, but then I could not tell you whether they were or not or whether any of those that were delayed were fermenting.

JUROR.—Was that July or August delivery.

A. Well, there was part of them in July and part of them in August.

Q. Now, the goods were delivered there at night-time, part of them, were they? A. Yes, sir.

Q. Who received them then?

A. The night man, Mr. Horne, I believe.

Q. What notation did you make about those goods and what did you do regarding them?

A. I would take the number; he would roll the barrels in the basement that night, as soon as he

(Testimony of E. L. Patton.)

received them: I would take the numbers [325] the next day of the barrels.

Q. He would report to you what he had received the evening before, would he? A. Yes, sir.

Q. Have you examined those barrels at different times since they were put in there?

A. Yes, sir.

Q. Can you state to the jury what the condition of those goods is, so far as outward appearance is concerned, at the present time?

A. The part of the barrels are in good condition; that is the outward appearance of them.

Q. About how many—have you counted them and made a memorandum of it?

A. Yes, sir, I have 231 barrels are in good condition. 231 barrels are in good condition, 143 barrels in what I call number two's, their heads are splintered, which is on account of the freezing of the barrel, or contents of the barrel; the barrel was too full and of course in freezing the contents will expand and that pushes the head or splinters the head; it has to have room in there to expand, in the freezing. I have also 24 barrels the heads are blown out.

Q. What about the balance of them, or have you related all that I—you said 231—

A. 231 are in good condition, 143 the heads are splintered on account of the freezing and there is 24 heads are blown out.

Q. Did you have any conversation with Mr. Van Doren about the filling of the barrels?

(Testimony of E. L. Patton.)

A. Yes, sir.

Q. What did he say in regard to the filling of the barrels?

A. I told him he was filling his barrels too full, or I thought he was filling his barrels too full; he didn't give enough space there for air or space for freezing. He says, "Yes, I knew that," he says, "I have got to be right there all the time to tell those fellows not to fill the barrels so full," he says, "I can't be there all the time to watch them." [326]

Q. Did you see these goods about the time Mr. Baker was there, say about August—

COURT.—Twentieth—about the twentieth.

Q. —about August twentieth?

A. I was down there every few days; every day or two.

"Q. Were you there at the time Mr. Baker was in there on August twentieth?

A. I expect I was some place around the building.

Q. Do you remember the time that he was there? A. No, I do not.

Q. Did you observe the condition of the goods along about August 20th?

A. I could not tell you on what date it was.

Q. Did you notice some fermenting at any time along in the early part of August or up to the middle of August, the twentieth of August?

A. Yes, sir, they were fermenting some. We drove nail holes in the barrels, each barrel that

(Testimony of E. L. Patton.)

came in, to take the pressure off the barrels.

Q. Each barrel as they came in?

A. Yes, as they came in.

Q. Now, state what portion of these goods you have covered here were fermenting at that time?

A. I could not tell you. I could not tell you what were fermenting which barrel. The gas forms in the barrel.

Q. Were any of those 231 fermenting?

A. No, sir.

Q. It was the 143 that you have spoken of there were the ones that were fermenting along in this time, in August?

A. There was something like that, yes, sir.

Q. Something like that? A. Yes.

Q. Did you take any barrel or barrels out of there and put them in another temperature to test it out, to see whether they would ferment?

A. No.

Q. I will put that question another way. Maybe you will understand it. Were there any barrels re-processed? A. Yes, sir. [327]

Q. How many? A. There were two.

Q. Who did that?

A. I can't think of the gentleman's name.

Q. Mr. Loy? A. Mr. Loy I think it was, yes.

Q. Did you get the barrels out of the store-room? A. Yes, sir.

Q. What kind of barrels did you get?

A. I selected two barrels, I selected one of the

(Testimony of E. L. Patton.)

number ones and one of them that had the head blown out.

Q. Where did you put those barrels?

A. Took them upstairs and let them thaw out and he re-processed them and we put them back down into the basement again.

Q. When you put them upstairs to let them thaw out what degree of temperature did you have on them?

A. They were about—I don't know what the temperature was outside; it was out in the hall.

Q. What time of the year was it?

A. I should judge it was about two or three months ago.

Q. Well, it was as warm as thirty-six, was it?

A. Oh, yes.

Q. How long before they thawed out?

A. It took them, I think it was somewheres about a week.

Q. Did they ferment? A. No, sir.

Q. Well, where are those goods now?

A. They are in the basement.

Q. Did you see them re-processed?

A. Yes, sir.

Q. What was done to them?

A. There was sugar added to them.

Q. How much sugar?

A. I could not tell you that.

Q. Was the sugar added to the good one or the bad one? A. Both of them.

(Testimony of E. L. Patton.)

Q. What was the condition of them after they were re-processed?

A. They seemed to be in good condition.

COURT.—Any difference in them? Any difference between the good and bad, after they were re-processed? A. Very little. [328]

Q. Did you taste them? A. Yes, sir.

Q. Could you tell any difference in the taste?

A. I could not tell any difference in the taste.

Q. How about the color?

A. The color is practically the same.

Q. Were you present when Mr. Baker with Mr. Huntley went down into the basement, into the storeroom, to get some samples?

A. Well, I was at one time; I don't know who the other gentleman was. I know who Mr. Baker was.

Q. How is that?

A. I don't know who the other gentleman was; I know Mr. Baker.

Q. There was some gentleman with Mr. Baker.

A. Yes, sir.

Q. How many samples of it were taken?

A. They took out of two barrels.

Q. What kind of barrels were they that they took them out of?

A. We opened up one barrel; took it out of the best.

Q. Took it out of the best? A. Yes.

Q. Did you take any out of the other?

(Testimony of E. L. Patton.)

A. I am not certain; I think he took one out of one with a broken head.

Q. Broken head? A. Yes, sir.

Q. Is that the only time he came there to get samples?

A. I believe he was there once before or once afterwards; I don't remember which it was.

Q. You don't remember which it was?

A. No.

Q. Was anybody with him?

A. I think there was.

Q. Was it the same person?

A. I could not tell you that.

Q. Do you know how many samples he took that time?

A. He took, I think he took the sample out of one barrel.

Q. Do you know what kind of a barrel it was?

A. No, I don't remember.

Q. Did he tell you what he was going to do with it? [329]

A. No, sir, only he wanted it as a sample.

Q. Have you any record there, Mr. Patton, of the barrels that blew up?

A. Yes, sir, I have a record of part of them.

Q. Can you state how many there are from looking at that record?

A. It would take some little time.

Q. Or from memory, if you know; if you have checked it over; do you know? A. I don't know.

COURT.—Are you referring to barrels that

(Testimony of E. L. Patton.)

blew up before they went into the basement or afterward.

Q. Yes, before they went into cold storage is the time I am speaking of. Just give the number of barrels and the date and how many barrels there were on each day, before they were put into the cold storage.

A. On the thirteenth of August barrels No. 605, 606, 608, 609; that was on the thirteenth of August. On the seventh of August barrels 561, 572, 579, 580, 582, 584. On the eleventh 588.

COURT.—Just give the date. A. August 7.

COURT.—Are you still talking of the eleventh?

A. No, part of that is on the seventh.

COURT.—Give me the one on the seventh.

A. Barrel 572.

Mr. SPENCER.—Do I understand that is a record of the barrels that had blown up before they went into the cold storage? A. Yes, sir.

COURT.—That is what he is testifying.

Mr. SPENCER.—This is the seventh of August?

A. Seventh of August, yes, sir; 561, 566, 567, 572; those are on the seventh.

Mr. SPENCER.—Those others are marked out, then, that you gave us a while ago? A. No, sir.

Mr. SPENCER.—Let us get this straight.

A. Maybe I am reading them backwards, here, so you don't get the dates of them. [330]

Mr. SPENCER.—Do I understand on the seventh 572, 579, 580, 582?

A. That was on the ninth.

(Testimony of E. L. Patton.)

Mr. SPENCER.—You read that a while ago on the seventh. A. That was on the ninth.

COURT.—What on the ninth?

A. On the ninth there was 579, 580, 582, 584; that was on the ninth. On the eleventh 588, 589, 591. And on the twelfth is 600.

COURT.—What was done with these barrels that blew up?

A. They were put down in the basement.

Q. What do you mean by blowing up?

A. Blew the heads out of them and part of the contents were lost. Tried to save what we could out of the contents of each barrel.

COURT.—Didn't you issue all the warehouse receipts, storage receipts?

A. Storage receipts, yes.

COURT.—You issued the storage receipts on the barrels?

A. Not on the ones that blowed; I had to leave these blank here.

COURT.—What?

A. I say, I had to leave those out.

COURT.—Didn't receipt for them at all?

A. No, sir.

COURT.—Mr. Baker never got a receipt for those?

A. On part of them, what we could save of them.

COURT.—Did you note on the receipts what you have saved? That is what I am trying to get at.

(Testimony of E. L. Patton.)

A. No, sir. I had this just for a record, is all.

Q. Is that all the record you have?

A. No, there is quite a bit of it.

COURT.—There has been introduced in evidence first the receipts that were given to the truckmen by the party who received these goods.

A. Yes, sir.

COURT.—And then there has also been introduced in evidence [331] a subsequent receipt by you, as I understand it.

A. Yes, sir, my storage receipt.

COURT.—Storage receipt; what I want to know is, did you issue a storage receipt for those goods that blew up?

A. No, I could not, only the ones we could save.

COURT.—So these are not charged, Mr. Baker was not charged with these in your accounts?

A. Not in this book, no, sir.

COURT.—Was he in the receipts?

A. Not in the receipts.

COURT.—So then these that blew up are not part of the goods Mr. Baker stored?

A. That is what we could save of them.

COURT.—Well, did you issue any receipt to him?

A. Yes, sir, on what we could save, yes, sir.

COURT.—Is that shown on the receipt?

A. Not where they have blown, because I put it on this book.

COURT.—When you issued the receipt to him for the goods did you note on the receipt?

(Testimony of E. L. Patton.)

A. No, sir.

JUROR.—You issued a receipt for the goods that he didn't have, there, that were spilled out on the floor, according to all these receipts. Did you deduct that number of barrels?

A. For the number of barrels?

JUROR.—You deducted the number of barrels that were not good when you issued the receipts?

A. Those that were a total loss we did, yes, sir.

Q. (By Mr. BOOTHE.) Is that all of those you have noted there, that blew up?

A. No, sir. On the seventh, again—

COURT.—You gave that.

A. Did I give you 561?

COURT.—Yes.

A. On the fifth barrel 548. [332]

Mr. SPENCER.—What is the reason we can't have those in consecutive order?

A. I started at the back.

Mr. SPENCER.—Been jumping around.

A. On the first—

COURT.—Only one on the fifth?

A. One on the fifth, yes.

Mr. SPENCER.—First of what, Mr. Patton?

A. First of August. Barrels 431 and 432. On the second of August there was barrel 449; on the first again there is barrel 414 and 417.

COURT.—Why didn't you give that before, when you were giving the first?

A. Part of it is on the other page.

COURT.—I see. Now give me those.

(Testimony of E. L. Patton.)

A. On the first?

COURT.—Yes.

A. Well, there is barrel 414 and barrel 417; you have got those on the first?

COURT.—Yes, I have got two on the first.

A. Then on the 28th of July barrel 261, barrel 246—

Mr. BOOTHE.—What number?

A. 246; there is barrel 265, that also was on the 28th. On the 26th barrel 210, barrel 193. I believe that was all of the barrels that were reported that had heads blown out.

JUROR.—Were those heads blown out or in bad order? A. Heads blown out.

Q. I figure that up to number twenty-eight; is that about right?

A. Something like that; yes, sir.

Q. Something like that; that is what your memory serves you? A. Yes.

COURT.—Do you know how many barrels in all were delivered by Mr. Baker?

A. Altogether?

COURT.—Yes.

A. I have the record here. A thousand barrels in the first lot and 630 of another lot. [333]

COURT.—What do you mean by lots?

A. Well, he numbered them up to one thousand and then went down and then he commenced at one again and numbered them over again.

COURT.—That makes 1,630?

A. Something; I forget just how many.

(Testimony of E. L. Patton.)

COURT.—While this matter is yet fresh in my mind, just to get one or two matters cleared up, did you, when these barrels came in and the heads blew out, did you make a memorandum in this book at that time? A. I did, yes, sir.

COURT.—At the time? At the time it was done? A. I put it on the date.

COURT.—On the date you invoiced them you made that memorandum? A. Yes, sir.

Q. I notice here on August thirteenth that you give 605, 606, 608 and 609 as blown out, and there isn't any memorandum in the book about it; how do you account for that?

A. You mean the memorandum here?

Q. Nothing about that. A. Those here?

Q. Yes.

A. Why, we could not get the number of barrels.

Q. I notice you don't mark those.

A. It was so that I could not get the number or could not get the weights on there.

Q. I see on this page, you will notice, you entered after these numbers the word "Blown," "Blown." A. Yes, sir.

Q. Now, does that mean that those were not credited to—I might say credited to Mr. Baker at all. Were they so destroyed that they were not counted?

A. The heads were blown out so that we could not get the number and [334] weights on the barrels; you see the heads were destroyed.

(Testimony of E. L. Patton.)

Q. I have not been able to understand yet about the receipts.

A. Any of those barrels, when they blowed the heads off we tried to save the contents as much as we possibly could.

Q. And then receipted for them?

A. And then receipted for part of them.

Q. That is what you said a moment ago; now I want to know what part you receipted for and what you didn't?

A. Some we could not receipt for; we have a lot of empty barrels down there now in the basement, several empty barrels down in the basement didn't give a receipt for.

Q. How many of them? A. I don't know.

Q. Now, in issuing the receipts for a barrel that was blown out, the head of it, did you note that fact on the receipt? A. No, sir.

Q. That it was in a damaged condition?

A. No, if I give the receipt for the number of barrels received.

Q. Yes, but you were receipting to the owner, too? A. Yes, sir.

Q. And you didn't note on the receipt—

JUROR.—For instance, if a barrel was blown up when you issued the receipt.

A. Some were blown up after the receipt had been issued.

JUROR.—Did you put a notation on the receipt and note the number of the barrel so you had an account of it?

(Testimony of E. L. Patton.)

A. After we received the barrel, some of them, their heads were blown out.

COURT.—I thought this record was the record you made at the time you received them?

A. At the time I received them, yes, sir.

COURT.—So this record only shows the ones the heads were blown out at the time you received them. A. At the time we received them. [335]

JUROR.—Do I understand the contents of these barrels, some, were entirely lost?

A. Some were entirely lost.

JUROR.—I can't understand how you accounted for the number of barrels lost to Mr. Baker, if there was no record.

A. The numbers on the barrels would show that the barrels were a total loss.

JUROR.—When you made a receipt, if there was a number missing in that list of barrels Mr. Baker understood that barrel had blown out?

A. I don't know how they made up the receipts in the office; I made out my receipts and turned it into the office.

JUROR.—I was trying to get at how you made the account for the barrels blown out.

COURT.—That is what I am trying to have him clear up.

A. I would put down what barrels were received in practically good order, that is all that we could save at the time; but part of the barrels blown up afterwards in the basement we could not save—

(Testimony of E. L. Patton.)

that is we could save part of the contents, but not save all of them.

Q. A barrel blown up after you had given the receipt for that? A. Yes.

COURT.—That would not have anything to do with your record here, would it?

A. The one that blowed up in the basement?

COURT.—Yes. A. No, sir.

JUROR.—In other words, those that were absolutely worthless you made no record of.

A. No.

JUROR.—That is the idea. And those in partial bad order?

A. These I made a record on this books of the ones blown up before received.

COURT.—You didn't issue a receipt, no receipt was issued [336] to Mr. Baker for them?

A. That is the ones that were a total loss when received, no, sir.

JUROR.—That is the idea.

Q. Do you remember that shipment of berries to John Sexton & Company?

A. I don't know; I don't remember that particular car, no, sir, or any particular shipment.

Q. ASD 895?

A. I don't remember the car; I know we were making quite a number of shipments at that time; they would be two or three cars a day.

Q. I will ask it this way; in the shipment of these goods, two cars from Mr. Baker, I would say, before they went out— A. Yes, sir.

(Testimony of E. L. Patton.)

Q. What condition did they go out, so far as the barrels were concerned?

A. The barrels seemed apparently in good order; any barrels that were—that didn't show good order I would put them back in the basement again.

Q. Were they cleaned up? Were the barrels cleaned up before they were put into the cars?

A. Part of them were cleaned, yes, sir; that is if they needed it bad.

Q. Was there anybody there to represent Mr. Baker, see that the goods were all right when they were shipped? A. No, sir.

Q. Was Mr. Van Doren there?

A. Yes, sir, was there part of the time, yes, sir.

Q. He was there?

A. I believe Mr. Van Doren was there when we were loading one or two cars.

Q. Did he approve of the condition of the goods as they went out?

A. He didn't disapprove of it.

Q. And that is true, is it, as regards all of the goods you shipped out?

Mr. SPENCER.—No, he just said it was not true; he said he was there once or twice when it was shipped out.

Mr. BOOTHE.—Just strike that question. [337]

Q. In regard to all the goods that were shipped, were they sent out in good condition, so far as outward appearances are concerned? A. Yes, sir.

Q. And were they all frozen?

A. They were in good condition, yes, sir.

(Testimony of E. L. Patton.)

COURT.—I asked you just before recess if you could give me the number of barrels that were brought there for Mr. Baker, the total number; you gave me two lots, one a thousand and one 630?

A. Then there was one lot of 530.

COURT.—530 and 630?

A. 530. No, hold on, that is strawberries. Wait a minute. There were a lot of loganberries, what they call beach; they were prepared, I believe they said, they were part sugar in them. I forget now just how many barrels there was. I have a record of it here some place.

COURT.—I don't care about that. I only want those that went in cold storage.

A. They went in cold storage.

COURT.—They don't count in this case.

A. No.

COURT.—Mr. Reid testified there was 1720 barrels received; what is your record?

A. Well, this record shows here one lot of a thousand and the other lot here of 630; that was the second lot that came in.

COURT.—Any others?

A. Well, except those beaches.

Q. What is that?

A. Yes, sir, that is all that shows in here; might be more than that.

JUROR.—How were they segregated in two lots that way, when they were shipped in every day? How do you make the segregation in two lots?

A. We put a lot number on each barrel and in

(Testimony of E. L. Patton.)

shipping them out we shipped them out as when started in, at number one, and shipped them [338] out as near as we could, one hundred barrels or one hundred and two barrels to the car, and that next number, whatever we left, that was shipped on and continued down the line in the numbers?

COURT.—Does counsel know how many barrels were receipted for?

Mr. SPENCER.—1630 is our notion; if we had any other number we would like to know.

COURT.—There were some Beechnut ones, did they make the 1720?

A. There was some what they call beach, prepared berry.

Q. That is about how many?

Mr. SPENCER.—1630 is all we have.

Q. Then these beach made up the balance?

A. Yes, I think it is the beach berries.

Mr. BOOTHE.—That is all I want to ask this witness, but I would like, if it would be satisfactory with counsel and the Court, to wait with the cross-examination of Mr. Patton until I could call another witness who works at night and wants to get away.

Mr. SPENCER.—That is all right with me.

Witness temporarily excused.

Testimony of William Horne, for Defendants.

WILLIAM HORNE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of William Horne.)

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Horne, what was your business in the summer of 1920?

A. I worked for the National Cold Storage and Ice Company.

Q. What were you doing?

A. Night foreman there, taking care of the warehouse.

Q. Did you have anything to do with the receiving of those goods brought by truck for H. A. Baker?

A. Yes, sir. [339]

Q. When they came at night did you receive them? A. Yes, sir.

Q. I presume you could not tell how many you received, could you?

A. No, I guess I received the most of them.

Q. Most of them at night? A. Yes, sir.

Q. What was the condition of those goods, so far as you could tell from outward appearance when they came in there?

A. Well, there was some good and some bad and some the heads blowed up, you know.

Q. Well, how many would you say had the heads blown up?

A. Well, some would be one on a truck, you know, blowed all over the truck. I had to get a truck and truck it in, and some you could see them sizzling.

Q. Do you know about how many were sizzling?

A. Well, I could not very well tell on the truck, you know, until I get them rolling in the gangway.

(Testimony of William Horne.)

You see as soon as I turned them over and roll them the stuff kind of fermented and you could see it.

Q. After they were setting a little while, then, did they begin to ferment?

A. No, they were standing up on the truck, you see, then they would turn them over and I would roll them up to the elevator and then you could hear them sizzling, squirting out on the side. Some. Some would not.

Q. Did you see any barrel blowed up?

A. Yes, sir; one blew up right beside of me. The head just blew right up. I was standing like this, and bing, she went over me. I was berries from head to foot, loganberries.

Q. Was the truckman present then when you did that? A. Yes, sir; he laughed.

Q. Did any of those barrels have nail holes or vent holes in them [340] when they were brought there by the truckmen?

A. Yes, sir, they done that to keep them from blowing up on the road, towards the last, to give them air.

Q. How do you know that?

A. Well, when you tip a barrel over and start to roll it, she started sizzling out of the little hole, you see, a little hole, s-s-s-s-s-s-s, and I asked the driver.

Q. Did the truckman say anything about putting those holes in? A. Yes.

Mr. SPENCER.—The truckmen were not confronted with this testimony; they were here.

Mr. BOOTHE.—All right, then.

(Testimony of William Horne.)

Q. How many barrels did you find that had holes in them?

A. Oh, I didn't say, I didn't keep track of them; I didn't pay attention that close.

Q. How is that?

A. I could not say that, how many.

Q. Well, were there several?

A. Oh, there were several, yes.

Q. Now, when those barrels were unloaded, how long did you leave them lying there before you put them down in the freezer?

A. As soon as I got them off the truck I put them down in the basement.

Q. How long would that be before you would get a truckload down into the freezer?

A. Oh, I guess about an hour; less than an hour; just had about twenty barrels to get down, maybe eighteen. I took four at a time in the elevator and rolled them right in.

COURT.—That is in the cold-storage room?

A. That is in the big basement; I only had to drop them right down.

Q. Was there any time you allowed those barrels to lie there in the road until another truckman should come along?

A. No, sir. I was ordered to put them down as soon as I got them.

Q. Were you always present there, responded promptly, when they came in? A. Yes, sir. [341]

Q. That is quite a large plant there, isn't it?

A. Yes, sir.

(Testimony of William Horne.)

Q. Covers a whole block, does it not?

A. Yes, sir.

Q. And your duties were all over the whole plant?

A. Yes, sir, I get pretty near over the whole plant.

Q. On top of the cars and everywhere?

A. Yes, sir.

Q. No trouble to find you at any time, was there?

A. No, no trouble.

Q. When the barrels of berries, then, were put down in the cold-storage place your duties were done in regard to them?

A. Yes, sir; I reported to the day foreman how many was blowed and what the temperature was to the berries.

Q. You reported to Mr. Patton?

A. Yes, he relieves me and I relieve him.

Q. Did you sign receipts for them when you took them in? A. Yes, sir, I signed receipts.

Q. Receipted for so many barrels each day?

A. Yes, sir.

Mr. BOOTHE.—That is all.

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Horne, in giving those receipts to the drivers for the barrels you undertook to note on the receipts the ones that had blown out, wouldn't you?

A. No. The first one I got a load, the barrel was blown clean out and I made a note of that and the driver said, "That is the first time I ever got a broken barrel."

(Testimony of William Horne.)

Q. When was that?

A. I could not remember the load.

Q. Was it in July or August?

A. July, I think latter part of July.

Q. Did you write that down on the receipt?

A. I believe I did and I made an account of it.

Q. On the receipt? [342]

A. Yes; I said I could not sign for only so many barrels. Then I made a receipt, I think I made a note; I am not sure.

Q. And then what happened after that?

A. And after that it was just a common occurrence, took the barrels the way they came.

Q. You mean you didn't note on the receipts after that? A. No, didn't note at all after that.

Q. Didn't make a note?

A. No, bursting of a truckload is a common occurrence.

Q. Suppose it should appear from the receipts that there are no notations at all in July?

A. July?

Q. There is quite a bunch of them here and suppose that it should appear that there are no bad order receipts at all in July on any receipts that you gave, why, then, you would be mistaken about having noted anything on the receipt in July?

A. Might not be in July; might be in August.

Q. I understood you to say that you didn't note any after that. Just one time you remember noting and then you quit after that. That is all.

(Testimony of William Horne.)

A. That is all I remember. It was a common occurrence.

Q. I just want you to give us what is the fact about it. A. Yes.

Q. Did you note—after this first occurrence, did you note on the receipts or did you not? Was it your practice to note on the receipts bad order barrels? A. I don't think, after that one.

Q. Well, starting in on these receipts, Mr. Horne, and taking the last one first, easiest to handle, here is a receipt dated the 12th day of August, and it says on it "2 broken." What does that mean?

A. That is a head broken.

Q. Is that your writing? A. Yes, sir.

Q. Signed W. Horne? A. Yes, sir.

Q. That is on the 12th of August? [343]

A. Yes, sir, in August. I don't believe I signed any more than that.

Q. Now, here is one on the 10th of August. Says "2 barrels broken." "2 bbl. broke." Is that all your writing, W. Horne? A. Yes, sir.

COURT.—What is the date of that, Mr. Spencer?

Mr. SPENCER.—Tenth of August; August tenth.

Q. And here is one on the 8th of August, 3 barrels broken?

A. It is 3 barrels broken. Yes, sir, that is my signature.

Q. Eighth of August; and then here is one on the seventh of August, says "1 barrel bad order."

A. Yes, that is mine.

(Testimony of William Horne.)

Q. So that you did have a practice there of noting when the barrels came in?

A. Yes, I did, but it came in too heavy so that I could not keep track of them.

Q. What was the idea of noting these four or five times and not noting the rest of the times?

A. Well, it was just like a common occurrence, every day, every night.

Q. Would you undertake to tell us now how many barrels did come in in bad order that you didn't note on the receipts? A. How many?

Q. Yes. A. No, I didn't pay much attention.

Q. I think there is about eight noted on the receipts. A. Well, there is more than that.

Q. Would you undertake to say that there was more came in without heads? A. Oh, yes.

Q. How many?

A. Oh, sometimes there are two or three on the truck that have blowed up on the road, you see.

Q. You would not note that on the receipts at all?

A. No, just a common occurrence after that.

Q. Did you note that one on the receipt that blew up and blew the berries all over you? [344]

A. I don't know if I did or not; I could not swear to that, either.

Q. Now, Mr. Horne, I understood you to say that all of these berries that were shipped out by refrigerator-car went out in first-class condition?

A. No, sir, not me.

COURT.—You are speaking about Mr. Patton.

(Testimony of William Horne.)

Mr. SPENCER.—I beg your pardon. I have another man to cross-examine here.

Q. You didn't testify about that? A. No.

Q. How many barrels had nail holes that came in there? A. Well, I could not say that.

Q. Well, now, you have said.

A. You see, you could not tell, sometimes, until you saw them squirt when you start to roll them, you see; the stuff would kind of start stirring up in the barrel and it would squirt out that little hole.

Q. Well, do you know how many? Can you give us any idea?

A. No, I could not say; I never kept track.

Witness excused.

Mr. BOOTHE.—For a similar reason I would like to call a gentleman from Salem. He wants to get back to-night.

Testimony of F. Von Eschen, for Defendants.

F. VON ESCHEN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Where do you reside? A. Salem.

Q. What is your business?

A. Professor of Chemistry, Willamette University.

Q. Have you ever had any experience in the handling of loganberries and other kinds of berries?

(Testimony of F. Von Eschen.)

A. I have. [345]

Q. How long experience have you had in that matter?

A. In the testing of fruit for the last—in Salem for the last fourteen years, more or less, during the summer and some time during the year.

Q. And how long have you been connected with that institution in Salem? A. Fourteen years.

Q. And you are now connected with them as chemist? A. I am; yes, sir.

Q. I will ask you if you had anything to do in and about the packing plant of Baker at Salem during the season of 1920?

A. You mean the Kurtz packing plant?

Q. Yes, with Kurtz packing plant; were you about that Kurtz packing plant during the season of 1920? A. Yes, sir; I was.

Q. What were you doing there then?

A. Helping Mr. Kurtz and overseeing some of the packing of the fruit.

Q. Did you see them packing these berries for Mr. Baker into barrels?

A. I saw them packing berries in the barrels in the other warehouse, but I do not know to whom the berries belonged; that I can't say.

Q. There was only one other place there that packed?

A. There was only one other place in the warehouse across the track, belonged to some concern.

Q. How were they packing those berries?

A. Dumped into barrels and shoved down with

(Testimony of F. Von Eschen.)

sticks and dump in more berries and filling the barrels.

Q. Were they beating them down in the barrels?

A. Partly, yes.

Q. Did you see any of the berries that came in there to Mr. Baker's plant?

A. You mean during the time that Mr. Baker had the plant?

Q. Yes.

A. Why, during the two days that I understood from Mr. Kurtz that Mr. Baker had the plant I was not there, but the evening before there was some berries came in that were supposed—I understood them to belong to Mr. Baker.

Q. You had something to do with the canning plant? A. Yes.

Q. Did Mr. Baker do any canning there?

A. I understood that he had rented the cannery for two days to do some canning. [346]

Q. Did you see any of the berries he was putting into the cans?

A. I wasn't there while he was canning.

Q. Did you see the berries?

A. The berries that came in that were supposed to go in the cans was the evening before.

Q. What was the condition of the berries?

A. They were not in condition I thought they would keep.

Q. Did you say anything to Mr. Baker about it?

A. Yes, I said to Mr. Baker incidentally that evening, I said I didn't believe they would keep.

(Testimony of F. Von Eschen.)

Q. What did he say?

A. He gave me to understand that he had canned over twenty years or so, that he knew his business, so I said nothing more; it wasn't anything to me.

Q. Professor, when those berries are put into barrels in the method in which you say they were put in, what would be their condition as to fermenting?

A. Why, fermentation begins immediately.

Q. Begins immediately? A. Yes, sir.

Q. Now, suppose those barrels of berries were put on to trucks and hauled down to Portland right away and delivered here to Portland in three and a half to four hours, that would be about fifteen miles and a fraction an hour, what effect would that have on the berries?

A. Fermentation would continue just the same.

Q. Now, when they arrived at Portland and unloaded the berries, would they be naturally fermenting; would they be fermenting on the trucks or would they begin to ferment afterwards; how about that?

A. The fact is that, that the moment that fruit is picked it begins to change, and if fruit is bruised and the bacteria of the outside [347] can reach it, it begins fermentation right away and that fermentation continues until the temperature is reduced sufficient to stop it.

Q. Now, how do they stop that fermentation?

A. You can stop it—that is, practically so, by reduction of temperature.

(Testimony of F. Von Eschen.)

Q. What degree of temperature would reduce that temperature?

A. If it falls below freezing point there is very little fermentation.

Q. Now, if they are fermenting so that the barrels are, we will say, sizzling, are those berries destroyed? A. Not entirely.

Q. And suppose then that they were chilled or frozen and the fermentation had stopped and the temperature was allowed to go up, to, say, thirty-six for one day, gradually go up until it was thirty-six for a day, and they should begin to ferment again and then immediately after that the temperature was lowered again until the fermentation was stopped; would that second fermentation add anything to the damage of the goods?

A. Yes, just to the extent of the amount of that second fermentation, just to that extent.

Q. Now, if the berries were put into the freezer in good condition, sound and good condition, how long had they ought to keep without fermenting if they are in good condition at, say, thirty-five or thirty-six degrees?

A. I would say they ought to keep three or four days under those conditions without doing much damage.

A. And if they had been frozen how long would they be—could they safely be allowed to stand in a temperature of thirty-six degrees?

A. Well, I would not want to leave them more than a week, even if they had been frozen.

(Testimony of F. Von Eschen.)

Mr. BOOTHE.—That is all.

Cross-examination. [348]

(Questions by Mr. SPENCER.)

Professor, you are, you say, instructing, you are in the Willamette University? A. Yes, sir.

Q. And have been there how long?

A. Fourteen years.

Q. Have you operated a packing plant, packing loganberries yourself?

A. Not operated, that is not personally, no, owned a plant and operated it, no.

Q. And you haven't had much to do with the practical end of handling and marketing these loganberries packed in barrels, have you?

A. Not outside of what testing of the fruit I have made that came from barrels and the fruit that was put in barrels.

Q. Your work there at Salem down around the plant was in connection with Mr. Kurtz's canning operations?

A. More than the barreling.

Q. More than what?

A. More than with the barreling operation.

Q. Well, Mr. Kurtz didn't barrel any berries there at that time? A. Well, somebody did.

Q. Well, did you ever—do you mean you had anything to do with Mr. Baker's barreling operations?

A. Well, I say I had nothing to do with that barreling operations.

Q. The fact is you didn't have anything to do with the barreling operations at all?

(Testimony of F. Von Eschen.)

A. Well, if you want to call it that; I condemned some berries somebody wanted to barrel there, somebody wanted to barrel.

Q. Mr. Kurtz didn't barrel berries?

A. I don't know who was barreling. I didn't ask. Some berries came they wanted to barrel and I said, "No, you can't; they are not fit."

Q. Who did? A. I don't know who did.

Q. Where was that, at the Kurtz plant?

A. Yes. [349]

Q. Did you understand that Kurtz was barreling berries?

A. That was my understanding. I never asked. The berries were not fit for barreling and I simply said, "You cannot barrel those, they are not fit."

Q. Was that this last day you spoke of; before Mr. Baker took it over?

A. I don't remember what day that was, no; I cannot tell you that.

Q. Who asked you whether the berries were fit to barrel? A. Nobody asked me?

Q. What you have to do?

A. I simply saw the berries that were unfit to barrel and my understanding at the time was that Kurtz was barreling berries. I never asked anybody. I said, "You cannot barrel those berries, they are not fit."

Q. Did you have authority?

A. Mr. Kurtz told me anything around the plant I saw was not right to go after it.

Q. You think it was some berries for Mr. Kurtz?

(Testimony of F. Von Eschen.)

A. Yes, that was my understanding at the time.

Q. And you were not undertaking to say to Mr. Baker or his men what they could do, were you?

A. No, certainly not.

Q. Well, Mr. Kurtz testified, as I recall, here, today, that the only barreling operation he did was last year, 1921. Now, if that is true, why, Mr. Kurtz must not have been barreling any berries in 1920?

A. I said a moment ago I didn't know who was barreling.

Q. Now, when was this that you talked to Mr. Baker about the berries that might or might not be fit for canning?

A. As I remember it now, he came through the plant with Mr. Kurtz.

Q. When was that? A. Well, that was—

Q. Do you remember the day? [350]

A. I think it was the day before going, as I remember it now, as Mr. Kurtz told me Mr. Baker had hired the cannery for two days, or rented the cannery two days; that is what I understood from Mr. Kurtz.

Q. Those berries, then, that you are now talking about, that you saw there the day before Mr. Baker took over the canning of berries for two days, those, then, were not the the finest selected berries?

A. No, they were not.

Q. I understand from you, Professor, that fermentation starts in just as soon as the berries are picked? A. It does.

(Testimony of F. Von Eschen.)

Q. And once it starts, why, it is always there.

A. It is always there.

Q. So that you think after a berry is picked there isn't any such thing as them being free from fermentation? A. No, sir, there is not.

COURT.—How long will it continue before the berries are unfit for use, for consumption?

A. That depends on the condition of your berry when it is picked, and also on the temperature.

COURT.—Well, how long, on the average?

A. On the average, in the early part of the season you can hold your berries at an ordinary temperature, if it is not too warm, for two days at least, or may be three; but if you take the last part of the season, when the berries are already in bad condition, you find they will not stand up three days.

Q. Well, they will stand up one day, won't they?

A. Some will and some won't.

Q. You know it is a common practice to pack berries, and pack them successfully, all during the month of August, that stand for a day before they get into the packing plant; don't you know that to be true.

A. They are not in very good condition when they come in. [351]

Q. Are you familiar with the extent of the loganberry business or the barreling business in loganberries in the Willamette Valley?

A. To a certain extent.

Q. How many barrels of loganberries are handled in the Willamette Valley at packing plants, are

(Testimony of F. Von Eschen.)

packed in the plants and then transferred by one means or another to the cold-storage plant?

A. That I do not know.

Q. But you do know that is a successful business, carried on quite successfully each year?

A. It can be carried on successfully.

Q. And don't you know that Mr. Baker has been successful in carrying on that business in the Willamette Valley in the past few years?

A. That is what he says.

Q. Well, you know that to be true from your knowledge of affairs around Salem and in the Willamette Valley; isn't that true?

A. Well, he has had some trouble.

Q. Well, he has had some trouble with these?

A. Yes.

Q. But wouldn't you rather expect him to have some trouble, if after he stored his berries in a cold-storage plant the temperature started up on the fourth day of August, the temperature in the room where they were stored began to get warmer and finally on the sixteenth day of August it reached thirty-five or thirty-six degrees and remained there until the twentieth day of August, and then they began to put it back again and claimed to get it back to twenty-seven degrees by the twenty-seventh of August; wouldn't you expect that the fruit stored in there would be affected by the process?

A. Was it frozen before? What was the temperature at which it was before?

(Testimony of F. Von Eschen.)

Q. It was subjected to a temperature of twenty-six degrees. A. Twenty-six degrees?

Q. Yes.

A. Then at what time did it begin to go up? [352]

Q. Started up on the fourth of August?

A. Reached thirty-six on what day?

Q. On the sixteenth.

A. On the sixteenth. When did it start down?

Q. Said to be on the twentieth.

A. Four days. I would say if that fruit was good that change did not hurt it very much, if any.

Q. It would hurt it, would it?

A. I have my doubts whether it would do any harm.

Q. You don't think it would do any hurt at all?

A. I have my doubts whether it would be any hurt.

Q. Now, if during this intervening period stuff was moved into the cold-storage plant and right out of the field, out of the packing plant, was shoved into a cold-storage room with a temperature of thirty-five or thirty-six degrees, what would be the effect on that stuff?

A. That stuff would ferment, because it is hot when it comes in.

Q. And that stuff going in there hot when it went in would not have a very good effect on the balance of the stuff that was already in there, would it, with the temperature aronud thirty-five or thirty-six?

(Testimony of F. Von Eschen.)

A. Absolutely no effect except as the temperature affects it.

Mr. SPENCER.—That is all.

Redirect Examination.

Q. I wish to make this suggestion of the temperature rising before the sixteenth to thirty-six degrees and remaining thirty-six degrees to the twentieth. I want to qualify that somewhat and ask you if the temperature got to thirty-six and went back from thirty-six and by the twentieth it was twenty-nine, that would be a better, more favorable condition, would it not?

Mr. SPENCER.—I object, there is no testimony to that effect. [353] Mr. Reid stated positively when he was down there with Baker on the twentieth the temperature was thirty-six, and also it was thirty-five or thirty-six on the sixteenth of August.

Mr. BOOTHE.—The reason I am asking that is, I am going to bring the engineer to testify what the temperature was. These gentlemen are mistaken on that.

A. Repeat that question.

Q. (Read.)

Mr. SPENCER.—I object to that as not being based upon any evidence shown in this case.

COURT.—On the theory that he will introduce evidence.

Mr. SPENCER.—All right.

A. Then I understand that the temperature went

(Testimony of F. Von Eschen.)

to thirty-five on the sixteenth and back to twenty-nine on the twentieth? Q. Yes.

A. Instead of remaining at thirty-five or thirty-six up to the twentieth?

Q. Yes.

A. That is a more favorable condition.

Q. That is the point I want to get at. That is all.

Witness excused.

Testimony of E. L. Patton, for Defendants (Recalled—Cross-examination).

E. L. PATTON resumes the stand.

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. SPENCER.—I would like to take a squint at that book, if I might, that Mr. Patton testified from.

Q. Mr. Patton, where—show me where your August dates are here, will you please?

(Witness indicates.)

Q. Mr. Patton, what kind of a record did you keep of the action of these barrels in the basement after they went in there? [354]

A. We could not keep any record of a great many of them on account that the heads were blown out and destroyed the number of the barrels.

Q. Well, for example, take a barrel that you had noted here like as having received on August first.

A. Yes, sir.

Q. The first number is in ink; are they the numbers of the barrels?

(Testimony of E. L. Patton.)

A. That is the number of the barrel, yes.

Q. 421. Now, suppose that that barrel would have blown its head on the 13th of August, would you make a record of that?

A. Could not—that is, could not do it very well, the way the barrels were piled up in the basement.

Q. Well, now, when did you make up this record of barrels blown? A. That is when they came in.

Q. By when they came in what do you mean?

A. The date that they came in.

Q. I know, but you were not there in the evenings when they came in?

A. I took the numbers of all the barrels that came in during the night also—the next day.

Q. Now, the fact is that most of these, the greater part of these barrels that you have marked on your record as blown happened after the fourth day of August? A. After the fourth day of August.

Q. It is—here, you started in, when you first gave us the numbers, starting in on August seventh—or, first of all, in August there was one on the fifth, then the seventh, then the ninth, then the eleventh, twelfth and thirteenth.

A. Didn't I give you any on the first?

Q. Yes, you gave four barrels on the first and one on the second, but the greater part of those were after the fourth day of August, weren't they?

A. I guess they are; whatever date is down there. [355]

(Testimony of E. L. Patton.)

Q. And do you know when the temperature started to go up? A. No, sir.

Q. You didn't have anything to do with that?

A. I had nothing to do with the temperature.

Q. Well, if the temperature started to go up on the fourth day of August in the cooling-room, it was after that date that most of these barrels blowed, that is true, isn't it?

A. I guess it was; I don't know what date it started to go up.

Q. I understood you to say, Mr. Patten, that so far as you were concerned you saw no barrels with nail holes that had been put in?

A. I didn't notice any, no, sir; they might have been put in there when the barrels were rolled in the basement.

Q. You were around there quite a good deal, weren't you? A. Yes, sir.

Q. And you were the man that made up these records? A. Yes, sir.

Q. And you were the man that made up these warehouse receipts that were mailed to Mr. Baker each day? A. Yes, sir.

Q. And you didn't see any barrels with any nail holes?

A. I didn't notice any. They might have been there, but I didn't notice any. I had men there to stand the barrels on end and as soon as they had the barrels on end, why, we drove nail holes in them in order to save the barrels as much as we could.

Q. And you, after the fourth day of August you

(Testimony of E. L. Patton.)

drove nail holes in practically all of the barrels that were down there?

A. Yes, because they came in such shape we done that to hold all we could of them.

Q. Practically all of the barrels? A. Yes, sir.

Q. But many of those barrels that were in there, that were there after the fourth of August, had come in July, hadn't they?

A. They were all in good shape; that is most of them.

Q. You said you drove nail holes in practically all of them. [356]

A. All of them that is after August first; that is the latter part of the season. The first ones brought in were practically in pretty good shape; that is the majority of them.

Q. But after about the fourth of August most all of the barrels down there began to show distress?

A. A good many of them; yes, sir.

Q. Until they got up to about seventy-five per cent of the barrels in the basement showing distress after, say, the fourth of August?

A. Well, I don't know how many.

Q. You would not undertake to say the per cent?

A. I would not want to say the per cent; no, sir.

Q. But you are certain that a lot more of them that were in the basement on and after the fourth of August showed distress than they had shown in previous days? A. The barrels as they came in?

Q. Those that were already there on the fourth of

(Testimony of E. L. Patton.)

August or afterwards, that had been put in before, showed distress after that?

A. No, very few of them.

Q. Well, the percentage of barrels in distress of the total barrels down there in distress after the fourth of August was much larger than any prior time, wasn't it?

A. That was on account of the berries coming in, yes, sir.

Q. And it was on account, something, of the temperature in the cold room, wasn't it?

A. It was on account of the state of the berries as they came in, much warmer weather, the berries were much riper, they would ferment a lot quicker.

Q. And they were put down there in a room which was supposed to be a cold room, but it was in fact not a cold room; isn't that true?

A. Well, I don't know what the temperature was; I could not tell you that. The engineer has the record of that. [357]

Q. Now, Mr. Patton, you don't undertake to say Mr. Van Doren was there when all the cars were shipped out? A. No, sir.

Q. And you don't undertake to say that the contents of the barrels shipped out were in good condition?

A. I could not tell you about the contents, only the outer appearance of the barrels.

Q. The barrels that were shipped out there were not in such condition but that the railroad company in accepting them noted on the bill of lading the

(Testimony of E. L. Patton.)

fact that the heads were stained? A. Yes, sir.

Q. You know that? A. Yes, sir.

Q. Along there in August, after the first of August, weren't you—you were shipping out?

A. I could not give the date.

Q. Do you know whether or not you were shipping out barrels after the fourth of August and before the twenty-first?

A. I could not tell you what date it was; I know we were shipping out berries.

Q. Shipping out berries right along there, weren't you? A. Yes, sir.

Q. And some of these berries you were shipping out had never got any temperature below thirty-five degrees?

A. The berries that were shipped out started to ship out the first ones; we commenced at the oldest lot first and ran down the line. We commenced at barrel No. 1 as near as I can remember.

Q. Now, have you any record of that?

A. They have a record, yes, sir.

Q. Where is that record?

A. I believe Mr. Reid has it.

Q. Have you a record of the numbers of the barrels that have been shipped out?

A. I believe Mr. Boothe has that, or Mr. Reid.

Q. Do you want us to understand that that record shows that the oldest berries of all were shipped out first?

A. I think we commenced at number one. I would not say that that was the first car, but that is

(Testimony of E. L. Patton.)

the way I understood, to go down [358] the line and ship out the oldest lot first. I am not sure, I could not swear to it, but we have a record.

Q. Would you produce that record?

A. Mr. Reid has it, or Mr. Boothe.

Q. Are you familiar with it?

A. I know my own writing.

Q. This is your record, is it?

A. It is a record I made myself of all barrels that went out.

Mr. SPENCER.—I would like to have you get the record, if you can. You have the record, Mr. Boothe?

Mr. WILBUR REID.—The record we have is the number of the barrels. I haven't got it right here, no, sir; it is on file in our office.

Mr. SPENCER.—I would like to have the witness produce that record in the morning, your Honor.

COURT.—It is time to adjourn now.

Whereupon proceedings herein adjourned to Thursday, June 15, 1922, at 10:00 A. M.

Portland, Oregon, Thursday, June 15, 1922, 10:00 A. M.

E. L. PATTON resumes the stand.

Cross-examination (Continued).

(Questions by Mr. SPENCER.)

Mr. Patton, referring now to the matter of the trucks unloading barrels there at the warehouse, at the cold-storage plant, when the trucks would come in where would they unload?

(Testimony of E. L. Patton.)

A. Well, sometimes they would unload on Washington Street or on the Washington Street side, and sometimes they would unload on the Stark Street side. We have two entrances.

Q. The cold-storage plant covers a block of property? A. Yes, sir.

Q. And you say you have two entrances?

A. Yes, sir. [359]

Q. Are the entrances in the middle of the block or in the corner?

A. The entrances are practically—reaches on one side practically reaches the half of the block, they are pretty nearly across the block; on the Stark Street side is a platform there with a short entrance near the corner.

Q. Now, the entrances consist of platforms, do they, that extend— A. Doorways, yes, sir.

Q. Doorways? A. Yes, sir.

Q. Do the doorways run immediately into a hall or is there a platform outside?

A. One side, I believe at that time there was just a doorway leading into one hall and on the Washington Street side there was a platform.

Q. And the platform on the Washington Street side ran clear across?

A. Practically the length of the building.

Q. A block long? A. Yes, sir.

Q. And the platform was all outside of the building? A. Yes, sir.

Q. The Stark Street entrance was through a doorway that ran into a hall? A. Yes, sir.

(Testimony of E. L. Patton.)

Q. Where was the elevator that went down into the basement where the cold room was?

A. About in the middle of the block.

Q. In the center?

A. Not right in the center, but practically in the center.

Q. Practically in the center of the block?

A. Yes, sir.

Q. And with reference to the Washington Street entranceway, was there more than one hall or doorway running into this Washington Street platform?

A. Yes, sir.

Q. How many? A. Two.

Q. And did both halls connect up with this elevator? A. Yes, sir.

Q. And how about the hall running from the doorway on the Stark Street side, did that run to the elevator? A. It ran to the elevator also.

Q. And how far, about, was the elevator from the Washington Street platform?

A. I should judge about one hundred and twenty-five feet.

Q. And how far would the elevator be from the Stark Street door, [360] about the same?

A. About seventy-five feet, or close—might be one hundred—something near it.

Q. Then this elevator was one that would carry about four barrels? A. Four to six barrels, yes, sir.

Q. That went down into the basement?

A. Yes, sir.

(Testimony of E. L. Patton.)

Q. And how was the elevator operated?

A. What?

Q. Was there a man to operate the elevator—separate elevator operator? A. No, sir.

Q. I see. The man that would be trucking barrels down into the basement would operate the elevator. A. Would operate the elevator, yes, sir.

Q. You left—you worked from six o'clock in the morning to six o'clock at night? A. Yes, sir.

Q. And while you were on duty who would truck the barrels down into the basement?

A. I had a day crew to take the barrels down there.

Q. And when you left at six o'clock would you be all cleaned up? A. Yes, sir.

Q. You would not leave any barrels there?

A. No, not any barrels left there. I would have those all checked up and in the basement.

Q. Suppose a truck arrived at five-thirty or five forty-five?

A. By the time he would have it unloaded the night man would be on duty.

Q. Some of the barrels that came in during that day would run over into the night shifts?

A. It might, yes.

Q. And Horne was the night man? A. Yes, sir.

Q. A great number of those barrels came in at night? A. The majority, yes. [361]

Q. Sometimes there would be—how many would you say might come in there one night? Be as

(Testimony of E. L. Patton.)

many as sixty or eighty barrels, possibly more than that?

A. No, there would not be any more than that.

Q. Well, two truckloads and two trailers would make approximately sixty to eighty barrels?

A. About sixty barrels, I should judge, something like that.

Q. Would you say that at no time would there come in at night more than two truckloads of barrels? A. Well, I could not say.

Q. From your checking up of the records in the morning wouldn't you have some idea?

A. Well, I should judge they would may be average two truckloads a night.

Q. Now, how would you get the record of the bad order barrels that you had on your book that you mentioned yesterday?

A. Why, they had mostly the numbers on the barrels, on the lids and whenever we could get hold of a lid, why, then, I could check up on that barrel.

Q. Where would you get that record? What place would you go to get that?

A. On those I had in the book there?

Q. Yes.

A. Why, if I would find the lids blown off I would find them in the barrel.

Q. Would you go in the basement to find them?

A. These that I had there were not blown in the basement, they were blown on the platform.

Q. You were not there at night when they came in?

(Testimony of E. L. Patton.)

A. But the night man was there and made his report. [362]

Q. What was his report, did he make the report on the book?

A. I made the report on that book, but he would show me what there was.

Q. When did you make that report?

A. First thing in the morning.

Q. Always made that the first thing in the morning? A. Yes, sir.

Q. Where did you get this information about the gross and the tare?

A. Sometimes we would find that on the lids, if they were not destroyed too much.

Q. And the lot number, where would you get that?

A. That was our lot number; that is our lot number we put on the barrels. We carry on the same lot number, under the same lot number we put the balance of the barrels.

Q. Well, how would you get that information, if these barrels all blew off the heads?

A. Well, I say, if we could find the deads there.

Q. I notice here in the book, beginning, we will say, August, here is one August 9, 1920.

A. Yes, sir.

Q. Barrel No. 585; the figures 585 and all the other numbers are written out in ink.

A. That is the number of the barrel.

Q. Yes.

A. Well, we copied down the numbers on the sheet

(Testimony of E. L. Patton.)

and then we tally out, check off the barrels from that number.

Q. The word "blown" is written in pencil?

A. Yes, sir.

Q. Way over here on the side of the column. Now, Mr. Patton, you said you had some record which would indicate the dates when the certain barrels would be shipped out? A. Yes, sir.

Q. Have you that record here?

A. I have the date of them.

Q. Have you the record, say, for instance, of barrels shipped out on August nineteenth?

A. Yes, sir. [363]

Q. And as a matter of fact the barrels shipped—does that record show when those barrels went in?

A. No, it don't show when those barrels went in, no, sir.

Q. Does it show the numbers of the barrels?

A. Yes.

Q. What were the number of the barrels shipped out on August nineteenth?

A. From the nineteenth—they ran from number one to 630.

Q. You didn't ship all 630 barrels out?

A. No, sir, we put in one hundred and sometime one hundred and one barrels to the car, but we had to take these barrels in order to get—

Q. You don't mean you shipped out 630 barrels on the nineteenth of August? A. No.

Q. I was asking you from the report.

A. This number on the barrels are the ones shipped out.

(Testimony of E. L. Patton.)

Q. I am trying to get the particular barrels you shipped out on the nineteenth of August.

A. Yes, that is on this list here.

Q. What are they? On the nineteenth of August you made a shipment out? A. Yes.

Q. In a refrigerator-car? A. Yes.

Q. What I am trying to get at is, what are the numbers of the barrels you shipped out on that date.

A. Here are the numbers of the barrels; not the number of barrels, but the number of the barrels.

Q. How many did you ship out on that day?

A. I think it was either one hundred or one hundred and one barrels.

Q. Among those barrels were number 610 to 630, aren't there? A. Yes, sir.

Q. 610 to 630? A. Yes, sir.

Q. And 610 to 630 was the last twenty barrels of the last lot received, weren't they?

A. Yes, sir, they were out of the last lot. [364]

Q. 610 to 630 was the last twenty barrels of the last lot received in August; that is correct?

A. Yes, sir.

Q. And barrels numbered 610 to 630, according to your book here, were received from the fourteenth of August to the nineteenth of August; does that show on the record you have?

A. No, it shows here they were shipped out.

Q. Shipped out on the nineteenth? A. Yes.

Q. And they were received at your cold-storage plant from the fourteenth of August to the nineteenth of August?

(Testimony of E. L. Patton.)

A. Now, on this lot here, I don't know whether that was out of the first lot came in of berrels or the second lot. We had two lots there; we have two lots there that had those same numbers. I don't know whether that was out of the first lot or the second one.

COURT.—Did you number the barrels as they came in?

A. The barrels were all numbered as they came in.

COURT.—The evidence for the plaintiff shows they were numbered consecutively from one up.

A. To a thousand, and then they commenced at one again.

COURT.—Oh.

Q. Could you take this book and relieve that—

A. Well, as I say, I could not tell you whether it was out of the first lot or the second lot.

Q. Do you mean your records would not show you whether the barrels were from the first lot or the second lot? A. No.

JUROR.—Can you tell from the lot numbers?

A. The lot numbers are not on this list.

Q. Can you tell from this book?

A. I could not tell whether they were shipped out at that time or not. It might have been 610 and got it on the first lot, or it might have been on the second lot. I could not tell you. [365]

COURT.—I understood you to say yesterday, Mr. Patton, that they were shipped out in the order that they were received?

(Testimony of E. L. Patton.)

A. As near as we could.

Mr. BOOTHE.—Mr. Reid has another record which showed that.

COURT.—This witness has testified, or he testified yesterday, that he shipped out in the order received in cold storage?

A. Yes, sir, as near as we could.

COURT.—That is a different thing.

A. Because some barrels were so that we could not ship them out.

Q. As a matter of fact barrels 610 to 630 of the first lot had been shipped out before that?

A. Well, I could not tell you.

Q. Well, now, just a minute; I will find number 610 and 630.

A. I picked out what I could there and what the bookkeeper had time to get out this morning.

Mr. SPENCER.—I think that is all.

A. This list here, that commences at one, the car that was shipped out in September 19 commences at one.

COURT.—Didn't run in consecutive order, one, two, three and four? A. No.

COURT.—Did it commence one, two, three, four, five and six? A. Yes, and so on down the list.

COURT.—In regular order?

A. In regular order as near as we could.

COURT.—As near as you could?

A. Well, sometimes a barrel was in condition we could not ship and then we would have to put some other in its place.

(Testimony of E. L. Patton.)

COURT.—This was shipped out August nineteenth? A. Yes.

JUROR.—When were the first two cars shipped?

A. I believe the first car was shipped—I don't know, something like in July. [366]

COURT.—What is the first one you have there?

A. July 26th.

JUROR.—That is what I want to get at.

COURT.—They are not numbered in consecutive order, are they?

A. Not on the paper, no, sir, but we have the numbers here, running from one on up.

COURT.—I notice on this one shipped on August 19 you ran down from 1 to 11, then you jump to 14. A. Yes, sir.

COURT.—Then down to 16. And then you go down—go down to 83 and you jump to 106 and then to 118, 124, and then 193 and 233, and then down as far as 630.

Mr. BOOTHE.—That is all just now. I think you would better remain here a little bit.

JUROR.—You said something about the barrels being too full. A. Yes, sir.

JUROR.—How full were the barrels?

A. Some of them, they were—a barrel, in my judgment, should be not less—filled any more than six inches of the top, and some of them were filled as full as they could get them and get the heads on.

JUROR.—After they were hauled there they were still clear full?

(Testimony of E. L. Patton.)

A. They were full, yes, and something had to give and they were starting gas to form in the barrels, something had to give and the head was the first one to go.

JUROR.—How much would those barrels weigh?

A. The average gross weight on them would average near five hundred pounds.

JUROR.—There was also something said about after this second freezing a good many of the barrels bulged and they had to be bunged. [367]

A. Now, in the freezing, the barrels were filled so that in the freezing of the berries they expand and of course when they are freezing they had to splinter the heads in order to give room. Water will expand in freezing—expand—I don't know how much, but quite a little bit, and the berries will expand more than the water will.

JUROR.—It appears that when they were first frozen there wasn't many that had to be bunged. and later more were bunged on the second freezing.

A. The latter part of the season the barrels had to be bunged on account of the gas forming in there and so I had a man take a nail and drive nail holes in every barrel that came in, in order to save it.

JUROR.—Now, if the barrels were only, say, partly full and it would ferment, form pressure, say five pounds on the barrel, and then the contents were expanded from freezing, would that put additional pressure on them enough to burst them?

A. If the barrel is only partly full of course it would take more than five pounds.

(Testimony of E. L. Patton.)

JUROR.—What I am getting at, if it had fermented to make a small pressure and then expand the contents, would that make an extra pressure and cause them to burst?

A. It would certainly make some pressure, yes, sir, certainly make some extra pressure.

JUROR.—Is there a record of the 398 barrels left in the warehouse, is there any record whether they are first lot or last lot or mixed or what?

A. I don't know. There must be some record there that would show on the barrels. I didn't notice that. I think they are marked L or X—X, I believe. X, and the number of barrels, and of course tare and net of each barrel, that was on the second lot. On the [368] first lot there wasn't anything marked there only the number of barrel, the gross, tare and net.

Mr. SPENCER.—(Resumes examination.) Q. Mr. Patton, you said—I understood you to say that the barrels weighed five hundred pounds?

A. Something like that; that is the gross weight.

Q. Now, I have before me your book here and your book shows—

A. Maybe they don't weigh quite so much.

Q. Shows what they call the net and the gross.

A. Net and gross and tare.

Q. And tare is the weight of the barrel?

A. Weight of the barrel—

Q. I notice running down through here—

A. —what they would weigh.

(Testimony of E. L. Patton.)

Q. In fact I don't find any that run to five hundred.

A. 480. I was only going by what the barrels coming in. Now,—well, 480 and 490.

Q. That is the net weight of the barrel, seems to run here, back August 2d, 419; on the second and third, 430; on the third here is one 415, 406, 412, 414, 430, 427, 425, 421. In fact, Mr. Patton, I don't find a single net weight—

JUROR.—He is talking about gross.

A. I am talking about gross weight.

Q. I don't find a single gross weight that runs to five hundred and this record would be the correct—

A. I was saying it would run near five hundred pounds.

Q. You were making it pretty large?

A. Certainly, because we had barrels in there that would weigh five hundred pounds and more.

COURT.—Let me see this shipping list, please. I want to look at that. On August—this shipping list shows August 12 that [369] barrels numbered from 610 to 613, '14, '15, '16, '17, '18, '20, '21, '24, '26 and '40—630, 631, were shipped on August 12, so that those barrels numbered 630 must have gone out on the 12th to the 19th, all of them?

A. I say 630; now, you will find another 630.

COURT.—I know there is another 630 on the nineteenth, shipped; so both numbers must have gone out either on the twelfth or the nineteenth.

A. Yes.

(Testimony of E. L. Patton.)

Mr. SPENCER.—The barrels numbered 610 to 630 on the last lot could not have gone out on the twelfth, could they, because the record shows they were not received until the 14th of August?

A. No, sir.

Mr. BOOTHE.—I think I have no questions to ask, but I will ask you to remain here.

COURT.—That is all.

Mr. BOOTHE.—Remain here until Mr. Reid brings the other shipping receipt. Call the engineer.

Witness excused.

Testimony of Alec Sharwick, for Defendants.

ALEC SHARWICK, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

What is your business, Mr. Sharwick?

A. Chief Engineer.

Q. Who were you engineer for during the summer of 1920?

A. National Ice and Cold Storage.

Q. Did you keep the record of the temperature on the different rooms in that cold-storage warehouse during that summer?

A. Yes, sir, every two hours. [370]

Q. Did you keep the temperature of the basement three? A. Yes, sir.

(Testimony of Alec Sharwick.)

Q. Is that the room where Mr. Baker's berries were stored? A. Yes, sir.

Q. And will you turn—have you got a record of this temperature at that time? A. Yes, sir.

Q. Will you take your record and tell us what it is? Did you make that record yourself?

A. No, I have three assistant engineers which took the temperature every two hours.

Q. That is made by you or under your direction —this record that is kept of the temperature at that time, is it? A. Yes, sir.

Q. Now, start August first, 1920, and tell what the temperature was on that room at the different days; running up, say, to the twentieth.

A. At eight in the morning shows twenty-nine degrees.

Q. On August first?

A. At ten, twenty-nine degrees; at twelve, twenty-eight degrees; at two, twenty-eight degrees; at four, twenty-eight degrees; at six o'clock twenty-eight degrees, and eight o'clock twenty-eight degrees; ten o'clock twenty-eight degrees; twelve o'clock twenty-eight degrees; two o'clock in the morning, twenty-eight degrees.

Q. That is the morning of the second, then?

A. Yes, second; twenty-eight degrees.

Q. Can you give us by days? Does it run about the same the whole day? A. Yes.

COURT.—Was the temperature twenty-nine degrees all day?

(Testimony of Alec Sharwick.)

A. Twenty-eight degrees; started in twenty-nine in the morning and brought it down one degree and was running twenty-eight degrees until two o'clock next morning.

Q. On the next morning it was how much? On the second it was how much?

A. The next morning, on the second, eight o'clock, she was [371] twenty-eight degrees; ten o'clock twenty-seven degrees.

Q. Just jump—it ran about the same that day; during the day that practically was—tell us what it was the next morning, for instance, the third?

A. The third it is twenty-nine that morning.

Q. And the fourth?

A. The fourth was thirty-one degrees.

Q. The fifth?

A. The fifth was thirty-two degrees.

Q. The sixth? A. Thirty-two degrees.

Q. The seventh? A. Thirty-two degrees.

Q. Eighth? A. Thirty-four degrees.

Q. Ninth? A. Ninth was thirty-four degrees.

Q. Tenth? A. Tenth was thirty-four degrees.

Q. Eleventh?

A. Eleventh was thirty-four degrees.

Q. Twelfth?

A. Twelfth was thirty-five degrees.

Q. Thirteenth?

A. Thirteenth was thirty-five degrees.

Q. Fourteenth?

A. Fourteenth thirty-six degrees.

(Testimony of Alec Sharwick.)

A. Fifteenth?

A. Fifteenth thirty-five degrees.

Q. Sixteenth?

A. Sixteenth thirty-five degrees.

Q. Seventeenth?

A. Seventeenth thirty-four degrees.

Q. You are sure that is thirty-four degrees or thirty-two? A. Thirty-four degrees.

Q. Eighteenth?

A. She went down to thirty-two later in the day.

Q. Later on in the day? A. Yes.

Q. Thirty-four degrees down to thirty-two degrees before the day was over?

A. Now, it was thirty-four degrees in the morning. We generally put the temperature on everything as low as we can.

COURT.—What was it on the eighteenth?

A. Eighteenth is twenty-nine degrees.

Q. The nineteenth?

A. The nineteenth thirty-one degrees.

Q. Nineteenth thirty-one degrees; now, didn't that go down to [372] twenty-nine again during the nineteenth?

A. The nineteenth? Let's see. It was thirty-one at eight o'clock; thirty at ten o'clock; thirty at twelve o'clock; twenty-nine at two o'clock; twenty-nine at four o'clock; twenty-nine at six o'clock; twenty-nine at eight; twenty-nine at ten; twenty-nine at twelve.

Q. Now, give us the twentieth?

A. Twentieth, thirty in the morning.

(Testimony of Alec Sharwick.)

Q. Didn't that go down to twenty-nine during the day?

A. It didn't go down to twenty-nine before ten o'clock at night; ten o'clock, twelve o'clock, two o'clock, four o'clock, six o'clock in the morning.

Q. What is the twenty-first

A. Twenty-first twenty-eight.

Q. Twenty-second? A. Twenty-nine.

Q. Didn't they reduce?

A. No, twenty-second I haven't got.

Q. You haven't got the twenty-second?

A. That is all I have got, from August first to twenty-first; that is all I have here.

Q. Does your record show what the temperature was along just before the first of August?

A. Oh, yes.

Q. And have you got it there?

A. I haven't got it along.

Q. You didn't bring the temperature, then, for only those particular dates we are asking you?

A. No.

Q. Do you know of your own personal knowledge, then, what it was before the first of August; was it higher or lower?

A. Before the first of August should be lower, because August was the hottest month, you see.

Q. You remember it was lower before the first of August? A. Oh, yes.

Mr. BOOTHE.—That is all.

Witness excused. [373]

Testimony of William Reid, for Defendants.

WILLIAM REID, one of the defendants herein, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Reid, you are one of the members of the firm, one of the National Cold Storage plant?

A. Yes, sir.

Q. You are the senior member? A. Yes, sir.

Q. Father of Wilbur Reid, who testified here?

A. Yes, sir.

Q. You don't do very much about the plant, yourself, do you? A. No, I do not.

Q. You are around there, however, a part of the time, are you?

A. Yes, I am around almost all through the day.

Q. I will ask you if at any time while you were there, if you saw any of these goods come in, these Baker goods that have been testified about?

A. Yes, I have seen the barrels come in, in fact I signed up for a good many of them.

Q. You signed up for them yourself?

A. Yes, sir.

Q. Do you know about how many you signed for?

A. I could not tell you exactly, but a number of truckloads came in.

Q. What was the condition of those berries when you signed, when you received them?

A. I noticed there was a number of them in bad condition, and I also called the foreman's atten-

(Testimony of William Reid.)

tion to it. I called his attention to it several times. I says: "Ed, we are going to have trouble with these berries."

Mr. SPENCER.—I don't think the conversation he had with this foreman ought to be—

Q. All right. You called the foreman's attention to it? A. Yes.

Q. What was the trouble with the barrels? [374]

A. Some of them were sizzling out and when you rolled them over the juice would run out.

Q. What did you do with those barrels when you received them?

A. They were put in the basement, and bunged, as we call it.

Q. Did you have any arrangement with Mr. Baker, anything said to you, what should be done with those barrels if any should come in bad condition?

A. I have none. I understood from Mr. Baker, I heard him say if a barrel came in in distress to put a nail hole in and bung it.

Q. You considered it your duty to best preserve those berries was to put them down there and bung them? A. Yes, sir.

Q. That is what you did?

A. Yes, that is what I did.

Q. Did you use your best judgment in taking care of them under his instructions? A. I did.

Q. Mr. Reid, something has been said about a conversation had with Mr. Baker relative to trying

(Testimony of William Reid.)

to adjust this alleged claim. A. Yes.

Q. Will you state what the conversation was between you and Mr. Baker, on your side?

A. Mr. Baker and that other gentleman—what is his name?

Q. Von Kesler.

A. Yes; they came over there and they done most of the talking and I think they made two trips there and they finally submitted a proposition to my son and wanted to—agreeing for so much by pounds, you know, I think it was seventeen cents for so many barrels, and they put in one hundred barrels at thirteen cents and I think I told Mr. Baker, after they fetched over their written agreement that I would think the matter over and would meet them at the Benson Hotel that evening. I didn't sign it at that time.

Q. Did you agree to sign it?

A. I don't think I did agree to sign [375] it. I thought I would better take the matter up with you before doing it. I thought in my own mind, I thought it was taking a pretty big risk on myself to guarantee the price for berries in Chicago when they were taken there and tested. You know what that means.

Q. Now, what was the result of the conversation you had in the Benson Hotel and who was present?

A. Well, there was yourself and Mr. Baker and this other gentleman—

Q. Von Kesler? A. Yes, and myself.

Q. Was Wilbur Reid there?

(Testimony of William Reid.)

A. Wilbur. I think there was not very much of a conversation. I merely told Mr. Baker to go on and handle his berries and whatever damages was done them, why, I was willing to meet him like a man on that, but I could not sign that agreement.

Q. Did you ask him to state to you how much his damage was that he claimed from you?

A. He could not give me that answer.

Q. I know; did you ask him for it?

A. I think I did, yes.

Q. Wasn't that about the last thing that was said?

A. That was the last that was said, and I pulled out my agreement and handed it to him.

Q. Didn't you say something to him like this: "Mr. Baker, if I have damaged your goods, let me know what it is and I will see what I can do toward paying it"?

A. Something to that effect is what I said then.

Q. And he refused to do that, did he? A. Yes.

Q. And that was the end of the meeting?

A. That was the end of the meeting.

Q. Now, something has been said, Mr. Reid, about the sale of these goods by the sheriff for taxes; you know something about that, do you?

A. I know a little something. The sheriff came over there with an attachment or a levy on them—attachment.

Q. Came to sell them? [376]

A. He was going to sell them and there was nobody bid on them.

(Testimony of William Reid.)

Q. Was the sale postponed?

A. It was postponed for, I think, two weeks.

Q. And then was there anybody there to bid on them? A. No, there was not.

Q. And then what was done?

A. In the meantime Mr. Baker had been in to see something about it and he said they overcharged him—overtaxed him.

Q. Did he tell you?

A. Yes, sir; he told it right in the office there and that was the last I saw of Mr. Baker.

Q. And he wasn't present at the time this sale took place? A. No, sir.

Q. Now, what did you do about the sale, when it was offered for sale?

A. Well, they were going to—there was nobody to bid on them and I bid them in to protect Mr. Baker and ourselves.

Q. Do you remember how much you paid for the taxes?

A. Why, I think the whole thing amounted to something like eleven hundred dollars.

Q. Now, what did you do, then, after that? Did you notify Mr. Baker? A. I think we did.

Q. How?

A. I think by letter; at least you have a letter there.

Q. What did you notify him?

A. Why, that we bought the berries in and paid his taxes. I can't really say just to the effect, but that is the sum and substance of it.

(Testimony of William Reid.)

Q. Did you ask him to reimburse you and he could have his goods again any time after that?

A. I think we did.

Mr. SPENCER.—There is no question but what the stuff was bought in by this gentleman at the tax sale and Mr. Baker knows about it.

A. I merely done it to protect Mr. Baker's interests. He could have bought a certain lot of them berries to satisfy the taxes but nobody set a [377] price on them and I bought them as a whole.

Q. And you were willing at that time to let Mr. Baker have his goods and pay you back, were you?

A. Why, sure.

Q. Are you still willing to let him pay you back?

A. They are his berries yet.

Mr. SPENCER.—I don't see the materiality of this. I object to it as immaterial.

Mr. BOOTHE.—We are not trying to take his berries away from him.

COURT.—Nobody is claiming but what he could have gotten the berries if he wanted them, but he says they are spoiled.

Mr. BOOTHE.—They brought this question out and I wanted their understanding.

Mr. SPENCER.—They said they were merchantable berries and I just brought out that they were sold for taxes and nobody would bid for them.

Mr. BOOTHE.—I don't know as that is any proof they were not merchantable berries. I didn't care to say anything about this, your Honor, but as

(Testimony of E. L. Patton.)

long as they brought it out before the jury I want it explained.

COURT.—He has explained it; he bought them in for taxes.

Witness excused.

Testimony of E. L. Patton, for Defendants (Recalled).

E. L. PATTON, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Patton, have you any additional statement, now, regarding those barrels that were shipped out —those that were shipped on August nineteenth? [378]

Mr. SPENCER.—He has already answered that.

COURT.—On the nineteenth? He had the shipping order here a moment ago.

Mr. SPENCER.—Your Honor asked a question that cleared that.

COURT.—Yes.

Q. Then have you any on the twenty-sixth?

A. Of that month?

Q. Of July?

A. July, yes, sir; one carload on the twenty-sixth.

Q. Now, does that statement that you have there show the number of the cars and the list?

A. This—it shows the number of the car and also the list of the barrels that went out.

(Testimony of E. L. Patton.)

Q. Now, what cars were shipped, according to that list, now?

COURT.—What cars or what barrels?

Q. What barrels were shipped?

A. Well, they were ranging from number one up to—well, they are mixed all in here, the numbers are.

Q. They are not put there consecutively, are they? A. No, sir; not on this car.

Q. How many barrels were there in that car?

A. Now, I think there was one hundred or one hundred and one. That is all we could get in the car, was from one hundred to one hundred and one barrels.

COURT.—Doesn't the shipping order show?

A. I haven't got it.

COURT.—You haven't footed it up?

A. I haven't footed it up.

Q. You don't remember whether it wasn't one hundred and five?

A. It might have been, I haven't counted it up.

Q. Those were the barrels shipped to Best Clymer, St. Louis, Missouri?

Mr. SPENCER.—That is admitted, that it is the car that went to Best Clymer.

A. It is an I. C. car.

Witness excused. [379]

Testimony of Wilbur P. Reid, for Defendants (Recalled).

WILBUR P. REID, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Reid, you made some statement regarding the temperature on your direct examination. Have you refreshed your memory now and are you clear on that subject, as to what the temperature was, say, from August on up to the twentieth?

A. The temperature on the sixteenth of August was thirty-five.

COURT.—You are testifying from your engineer's reports, are you?

A. We have the engineer's report here.

COURT.—He has testified to that.

Q. We have that now, Mr. Reid. You were testifying yesterday about it as of the twentieth being thirty-six at the time you had the conversation with Mr. Baker.

A. After refreshing my mind on that and going back to the records, the temperature was a colder temperature than that on the twentieth.

Q. That is what I wanted you to explain, that you are mistaken.

A. Yes; yes, our records will show.

Mr. BOOTHE.—That is all.

Witness excused.

Testimony of Hannis Loy, for Defendants.

HANNIS LOY, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Loy, what is your business? I will ask you, what business—have you ever been engaged in the business of handling berries, loganberries, for instance? [380] A. In what shape?

Q. Storing them, buying and selling, putting them in cold storage, or anything of that kind.

A. I have.

Q. What experience have you had in that line?

A. Well, I think I am the pioneer in Oregon.

Q. Well, for whom have you been employed in that capacity? A. Wadhams & Kerr Brothers.

Q. How long were you in their employ?

A. Nine years.

Q. And what did you have to do with regard to berries at that time?

A. We operated a preserving plant, a canning plant, and it was I had charge of that department.

Q. How long did you say that was?

A. About nine years; between eight and nine years.

Q. Did you handle large quantities of berries during that time? A. Yes, quite a lot of them.

Q. Have you had experience enough, do you think, with berries to judge their condition or quality? A. I have.

(Testimony of Hannis Loy.)

Q. I will ask you if you have ever examined the plant of the National Cold Storage and Ice Company with reference to those goods belonging to Mr. H. A. Baker? A. I have.

Q. How many times have you seen that plant?

A. The plant, not including the goods?

Q. The goods, yes; how many times have you seen those goods?

A. I should judge half a dozen times.

Q. Do you remember how many barrels there were that you examined?

A. I could nōt say what I examined. I examined probably twenty-five or thirty with the heads out.

Q. Now, state to the jury when you looked at those goods, what their condition appeared to be to you, from the outside—from outside appearance, first. [381]

A. They were, I should judge from the appearance, when they were packed they were overripe fruit.

COURT.—You are referring to the ones that are now in controversy in this case?

Mr. BOOTHE.—Now in controversy, these 398 barrels.

Q. You recognize the 398 barrels here in controversy, do you? A. Yes.

Q. Now, what did you say your opinion was as to them?

A. My opinion as to those that I examined was overripe fruit, I should judge, when they were packed.

(Testimony of Hannis Loy.)

Q. I don't know whether you saw them when they were fermenting or not; did you?

A. No, sir. Just a moment. No, not while they were fermenting, I didn't go there.

Q. Did you examine—make a thorough examination of those barrels, a chemical examination, you might say, or a test, as to their quality?

A. I made a practical test as to their use in the manufacture of jelly and jam.

Q. Now, what did you do? Tell the jury what you did in order to make a test of those berries?

A. In order to qualify them for jelly purposes they should have a certain amount of pectin in them; and pectin is in three stages; that is, it is first qualified as pectose, pectin and pectic acid. Pectose is the undeveloped acid and pectin is when it is in proper shape for that purpose, but pectic acid is when they are started fermentation or decay or overripe stage of the fruit. I tried a practical test by boiling this jelly, bringing it to a jell and the one barrel which had a head in it, I had taken out the juice, that apparently from the outside looked all right, the juice I got was a very thick, gooey mass; you would not call it jelly or you would not call it syrup. The open barrel which I boiled down brought only a thick heavy syrup. [382] I gave it an alcohol test for solids of pectin and it gave a very slight test of pectin, which gave me the theory that the fruit was in a very ripe stage when it was packed; also that the second barrel which had been blown open showed just a slight tinge of pectin

(Testimony of Hannis Loy.)

matter, pectin solids in the solution. The microscopic test showed a considerable amount of mould spores, which naturally would show in stuff that had been exposed of that kind, which could come while exposed in the open, in the barrel, or while the fruit had been picked in the fall. The loganberry when it has shown a fermentation, when you take a pomace and chew it in the mouth it gives you somewhat of a flavor as if you would chew clover hay; that is the sugar has departed and developed into alcohol, and in these barrels the alcohol evidently had evaporated through the freezing.

Q. Now, did you re-process one of those barrels, you say? A. I re-processed two barrels.

Q. What barrels did you re-process? Did you re-process one that had been blown out?

A. Yes, I re-processed one barrel that had been blown and one apparently that had not been blown; that is, the barrel from outside appearance looked to be in good shape.

Q. Now, what did you do in re-processing them?

A. I added a sufficient amount of sugar to the berry to bring it back into the state in which it had been prior to the state of fermentation.

Q. What was the result of that re-processing of those two barrels? Upon comparison was one of them any different from the other? A. None.

Q. The one that had blown up showed as good a condition, you say, as the one that had not been blown up? A. Practically.

(Testimony of Hannis Loy.)

Q. Why did you re-process the one that had not been blown up?

A. To get the comparison between the two. [383]

Q. Did you examine any of those barrels of berries that had not blown up? A. I did.

Q. What condition did you find them to be in?

A. I gave that a moment ago, Mr. Boothe.

Q. I was talking here and I probably did not get it. Will you state again for me?

A. I have found from appearance that they had been packed in a very high state—a very ripening stage.

Q. Well, are those berries ruined?

A. No, I would not say that they were ruined.

Q. Have they in your opinion a commercial value yet? A. Yes.

Q. Do you know how many barrels there are there that have not blown or fermented?

A. No, except I was told that there was so many with blown heads. I didn't examine the entire lot in the storage-room at the time. I saw a considerable amount that looked from outside appearance in good condition, and quite a bunch of them there that had their heads blown out.

Q. When those berries were brought there, if they were brought in a fermenting condition, and put into the cold-storage plant and frozen, would you say that they were damaged and ruined then?

A. What loss was visible in the berries had taken place already before they were placed in storage.

(Testimony of Hannis Loy.)

Q. How is that?

A. The visible loss in the fruit had taken place in the fruit before they were placed in storage.

Q. Does the freezing of the berry cure the damage that had resulted by their fermentation before they went in?

A. It will eliminate some of the damage to it, in so far as that if the barrel is open and exposed the freezing causes an evaporation and [384] consequently the alcohol will evaporate but it will leave a shortage of sugar by the alcohol evaporation.

Q. What effect does it have upon berries in hauling them, say, from Salem in trucks about fifty miles away, and bringing them down in three and a half to four hours, what effect would that have on the berries, as to their fermentation?

A. I would say a trip like that would break down the berries sufficiently to cause a fermentation before they were placed in cold storage.

Q. If they were put into barrels at Salem and mashed down slightly, would that have a tendency to cause them to ferment? A. Yes.

Q. And when might they begin to ferment after that was done?

A. The berries would start fermentation immediately on the breaking down of the walls of the berry.

Q. Now, Mr. Loy, if those berries, when delivered to the warehouse, were in a fermenting condition and they were put in the freezer and frozen, the fermentation stopped, and the temperature should

(Testimony of Hannis Loy.)

happen to go up to, say, thirty-six degrees, gradually, from twenty-nine up to thirty-six degrees in a period of some ten or twelve days, and the berries should ferment again, would you say that they were damaged or in a worse condition than they were before the temperature was allowed to rise the second time?

A. Give me that question again, Mr. Boothe.

Q. (Read.)

A. I don't know as the temperature arriving at thirty-six would cause a sufficient or a thawing out in twelve days' period to start the fermentation again in the fruit. I don't think it would, because in shipping frozen fruits in a car the average temperature on a refrigerator, salted and iced, is about forty-five degrees and the average shipment of a car takes ten days to two weeks, take for delivery in the east. [385]

Q. If those goods were in good condition when they were put in there would it be reasonable to allow the temperature to go to thirty-six degrees without endangering them for a period of a week or two?

A. I would say it would not endanger the fruit any more than any damage that had been done prior to that; although I will say this, that it does not do fruit any good to have it thaw out and refrozen two or three times. Every time it is thawed out there is a breaking down of the fruit.

Q. I want to show you some samples, Mr. Loy, I will show you the two samples, Mr. Loy; I don't

(Testimony of Hannis Loy.)

know whether you took them out of the barrels or not and put them in there, but we will show who did. Do those look anything like the berries that you examined?

A. Well, I could not say that these are the berries, but I would say from a general appearance that this fruit that I took out of these barrels, these two barrels I re-processed, were in this broken down condition when I re-processed them.

Q. How are those for color?

A. They are very good.

Mr. BOOTHE.—I will state that we will show by another witness here that these berries are out of the two barrels that Mr. Loy re-processed. They were taken out a few days ago.

Q. Do you want to make any further examination, inspection of those, Mr. Loy, to testify as to what the condition of that berry is?

JUROR.—I would like to ask a question, if this test was taken after the thermometer had been up to thirty-six or before? A. Yes.

JUROR.—It was after?

A. This test was taken when this re-processing was done, during the latter part of September, 1921. [386]

Q. Now, that little sizzling there seemed to cause some merriment. What do you have to explain about that, Mr. Loy, if anything?

A. Why, the addition of this sugar to this fruit which had once developed fermentation would naturally develop again into a fermenting stage after

(Testimony of Hannis Loy.)

thawing out and keeping to the last minute in a jar, a space like that, with that amount of oxygen added to the jar which laid between the lid and fruit, naturally would start fermentation.

Q. Any good fruit would do that, would it?

A. Yes.

COURT.—Was the jar sealed air-tight?

A. That would not matter, the oxygen, when you sealed the jar, was already in the jar, just simply.

COURT.—Was the fruit you tested in the same condition this was in? A. Yes.

COURT.—Liquid?

A. No, they were frozen at the time; the one barrel was frozen quite solid, the one that had the head out, and the other was in a more solid—

COURT.—But when you thawed it out it became liquid like these? A. Yes.

COURT.—It wasn't in the shape of a berry at all? A. No.

Q. Neither one of them was in the shape of a berry? A. No, I think that was my evidence.

Q. Will you say now, Mr. Loy, that those berries in that condition there are merchantable berries, good for food? A. Absolutely.

COURT.—Would you call them berries at all?

A. The way that they ship this fruit.

COURT.—Would you call them berries at all, or isn't that just simply a liquid formation of berries?

A. No, the solid of the fruit is still in there.

Mr. SPENCER.—I think the witness called it a gooey mass. [387]

(Testimony of Hannis Loy.)

A. A broken down mass.

COURT.—You would not be able to sell them in the market, to a groceryman or housewife, as berries?

A. No, there is not any fruit that goes east to the manufacturer but in that condition.

COURT.—It is not used for table use or anythink of that kind?

A. No, it is used for straight manufacturing, and jams and jelly stuff.

Q. That is the general rule, those berries shipped in barrels that way are used for jams, and so forth?

A. Yes.

Q. They are not used on the table as berries, are they? A. No.

Q. It is not expected at all with any of them, is it? A. No.

Mr. BOOTHE.—That is all.

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Loy, you say that these cells broke down by fermentation? A. Yes.

Q. And that that is one of the different things that spoils the product, is that the idea?

A. When the breaking down of the fruit takes place it is after an overripening stage condition of the fruit or a fermentative stage of the fruit.

Q. When you make loganberry juice you break the cells; what do you do with the cells then?

A. You would break them down to get the juice out of them.

(Testimony of Hannis Loy.)

Q. Well, loganberry juice is a pretty well-recognized staple article that is bought and sold, isn't it?

A. I should judge that from the shipping of loganberry juice out of the State of Oregon and Washington would be the only place where [388] they would produce a loganberry juice. I don't think it is possible that they would ship their berries back east and press them.

Q. Have you ever shipped any yourself, east?

A. Yes.

Q. Shipped any loganberries east? A. Yes.

Q. For loganberry juice? A. No.

Q. Have been engaged in that business; but I understood you to say that the breaking down of the cells causes fermentation.

A. The fermentation causes the breaking down of the cells.

Q. I see; that is the way it happens. Now, your idea is that, first of all, alcohol is produced as one of the steps in fermentation of loganberries, isn't it? A. Yes.

Q. That is necessarily so, isn't it? A. Yes.

Q. And what does fermentation—when fermentation starts what is produced besides alcohol?

A. Well, it is produced—the breaking down of the cells, which shows decay of the fruit.

Q. What is the gas that is produced?

A. The loganberry has a gas which is possibly unknown to any other fruit except that of loganberry; that is why it is a hard fruit to handle.

Q. What is the name of the gas?

(Testimony of Hannis Loy.)

A. Well, I could not say.

Q. Oh, it has not any name?

A. Oh, I suppose it is carbonic gas, I suppose.

Q. Carbonic acid gas?

A. Yes, it is an acid formation of the gas.

Q. Well, that is not a gas that was unheard of until the loganberry was started, is it?

A. Oh, for sure, I suppose that acid has always been in existence, but I say the loganberry has an acid qualification which no other fruit has.

Q. Now, you said that this alcohol being produced as the result of fermentation, that the freezing process causes evaporation of the [389] *of the* alcohol; is that your idea?

A. It would if the barrel was exposed open. Of course where the barrel was headed up airtight it could not evaporate, still be retained within the barrel.

Q. Well, if fermentation causes alcohol and when the barrel is frozen, does the alcohol evaporate?

A. If there is an escape for the alcohol vapors, yes.

Q. Supposing there is not any escape, does the alcohol stay there?

A. Absolutely it would stay there.

Q. And then when the barrel is opened up it would show alcohol afterwards? A. Absolutely.

Q. Produce alcohol?

A. That vapor would evaporate, then, when the fruit was thawed out and the lid taken out of the barrel.

(Testimony of Hannis Loy.)

Q. As a matter of fact heat causes evaporation, rather than freezing?

A. Both heat and freezing will cause evaporation.

Q. Heat causes a lot more evaporation than freezing?

A. Quicker evaporation, yes.

Q. And I understood you to say a while ago that it does not do fruit any good to let it thaw out and then freeze it again?

A. Oh, absolutely not; it breaks down the fruit that much more, every time it is frozen and thawed out.

Mr. SPENCER.—That is all.

JUROR.—You said that those 398 barrels still had some commercial value; what in your judgment would be that commercial value?

A. Well, that would depend a great deal on demand and supply at the time that the stuff was placed on the market. I would say this: That in the spring of 1920, when the futures were sold on loganberries in barrels, the market was in strong demand and good prices [390] were both paid the grower and the packer, and that during the fall the market dropped out on everything, so that it had virtually no market value in the latter part of the year in 1920.

JUROR.—But if these goods were re-processed as you say, why, they would be worth something?

A. They would command a commercial value, yes.

(Testimony of Hannis Loy.)

JUROR.—You would not be able to tell what that would be, or anything near it?

A. No, it is pretty hard to state, because it would be subject to the buyers, what he wanted to use it for; if he was wanting to make a high grade line of goods he could not use that stuff, and if he was going to make a cheap grade he would use a cheaper grade of stuff, and this stuff would qualify for a cheap jam. What I mean by cheap jam is not a damaged jam, but a jam that some manufacturers make with an apple base, use apple juice to set as the jelly is called, in this cheap jam.

COURT.—That is all.

Mr. BOOTHE.—Then you would say, Mr. Loy, that this entire lot of goods, these 398 barrels, have some fairly good commercial value right at the present time, would you? A. Yes, I would.

Witness excused.

Testimony of John Hill, for Defendants.

JOHN HILL, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

What is your name, did you say? A. Hill.

Q. Were you in the employ of the National Cold Storage and Ice Company during the summer of 1920? A. Yes, sir. [391]

Q. What were you doing?

A. Working in the warehouse.

(Testimony of John Hill.)

Q. Did you receive any of the goods that were shipped in by truck for H. A. Baker that came to that warehouse? A. Yes, sir.

Q. Do you remember when you received them, in the day time or night-time?

A. In the daytime.

Q. Do you remember how many different truckloads you received—about how many? I don't want to tax your memory on that, but you received several, did you? A. Received several, yes.

Q. I want to ask you more particularly what was the condition of those goods when they came in there, so far as outward appearances were concerned?

A. From outward appearances some of the barrels were in bad shape; some of them were blown up and some of them showed signs of fermentation; they were sizzling and leaking.

Q. How many on the truckload did you find in that condition?

A. Well, I would judge there would be probably twenty-five or thirty per cent of them.

Q. Could you hear them sizzling?

A. Yes, sir.

Q. What did you do with those goods when you received them?

A. I put them away in the basement in cold storage as fast as we could handle them.

Q. Were they put in there immediately after they came in? A. Yes, sir.

Q. Were they allowed to lie on the platform or

(Testimony of John Hill.)

in the aisle any unnecessary length of time?

A. No, sir.

Q. Would you take right hold of them and put them down immediately after they came in?

A. Yes, sir.

Q. Did you see any of the barrels blow up?

Q. Yes, I saw some of them blow up.

Q. Just explain to the jury what they did when they blew up?

A. Well, the heads would blow out of them and usually go plumb to the ceiling.

Q. What is that?

A. I say, the heads would blow out of the barrels and the contents [392] would go plumb to the ceiling, some of them.

COURT.—This is before they were put in the cold storage or after?

A. Some of them before and some immediately after; we had some of them blow up in the basement.

Q. That is before they were cold?

A. Yes, sir.

Mr. BOOTHE.—I think that is all.

Cross-examination.

(Questions by Mr. SPENCER.)

You say twenty-five to thirty per cent of them were sizzling and blowing up on the truckload?

A. I think so.

Q. And you just took them in and shoved them down in the basement?

A. Just as fast as we could handle them.

(Testimony of John Hill.)

Q. As fast as you could get them in. There was a whole lot more that were sizzling and blowing up around there after the first day of August, 1920, than before that, weren't there?

A. I could not say as to that.

Q. You don't remember that. As far as you are concerned, why, they were sizzling and blowing up all the way from the beginning of deliveries there in July to the end of the time is that right?

A. Well, I think the first part delivered, if I remember right, was the worst.

Q. The first part was the worst, in July?

A. If I remember right, yes, sir.

Q. They were sizzling and blowing up in July worse than they were in August?

A. If I remember right, yes, sir.

Witness excused. [393]

Testimony of Wilbur P. Reid, for Defendants (Recalled).

WILBUR P. REID, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

I will ask you as to the statements of the storage sent to Mr. Baker; have you knowledge of that fact? A. Yes, I have.

Q. How often were those statements sent to Mr. Baker?

(Testimony of O. L. Kennedy.)

A. Mr. Kennedy is just coming in the door.

Witness excused.

Testimony of O. L. Kennedy, for Defendants.

O. L. KENNEDY, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Kennedy, were you keeping the books of the National Cold Storage and Ice Company during the —from 1920 on? A. Yes, sir.

Q. Up to the present time? A. Yes, sir.

Q. And during all the time the Baker goods were coming in? A. Yes, sir.

Q. Did you make up the account for the amount due for storage? A. Yes, sir.

Q. Did you send statements to Mr. Baker on those accounts?

A. I did; I sent bills, invoices, from day to day, and statements at the end of each month for the balance due.

Q. Where did you send those statements?

A. All to Salem.

Q. Did you send all of them to Salem?

A. All to Salem.

Q. Who were they addressed to?

A. H. A. Baker.

Q. Did you send any to him at Tacoma?

A. Not as I remember of, no.

(Testimony of O. L. Kennedy.)

Q. Has he an office in Salem? A. Yes. [394]

Q. Who had charge of his office in Salem?

A. Mr. Van Doren, I believe.

Q. What room building—what building did you send them to? A. Just General Delivery, Salem.

Q. Did any of those—did you get an answer to any of those statements? A. No, none whatever.

Q. How did you address them, to H. A. Baker or to Van Doren?

A. H. A. Baker, Salem, Oregon.

Q. Did the envelopes have a return card on them?

A. Yes, return to National Cold Storage and Ice Company.

Q. Were any of those statements returned to you? A. None of them.

Q. How did you happen to send them to Salem? Were you directed by anyone, or how did you happen to send them to Salem?

A. When we first commenced receiving the goods Mr. Van Doren directed us to send all bills to Salem.

Q. General Delivery? A. Yes, sir.

Q. And addressed to H. A. Baker?

A. H. A. Baker, Salem.

Q. Now, you sent them every month, did you, a statement?

A. Sent them a statement at the end of each month, showing the balance due.

Q. Up to what time?

A. Up to—about, I think, either September thirtieth or October thirtieth.

(Testimony of O. L. Kennedy.)

COURT.—Of what year? A. Of 1921.

Q. What was the amount of the last statement that you sent to Mr. Baker, due for storage.

A. $5811.34; that was statement of September thirtieth, 1921.

Q. Has any of this—well, I believe you said it had not been paid. That is all.

Cross-examination.

(Questions by Mr. SPENCER.) [395]

Mr. Kennedy, Mr. Baker, you know that Mr. Baker did not operate his packing plant in Salem during the winter months? A. Yes, sir.

Q. And he was not there, does not live in Salem?

A. Yes, I was aware that he was away part of the time.

Q. And this bill that you sent out—these bills, included the storage charges on all of the stuff down to the end of the Fall of 1920; that was included in the bill, wasn't it?

A. Yes, all of the goods stored during the season of 1920.

Q. That of course included the 398 barrels in controversy? A. Yes.

Q. And in addition to that you still undertake to charge up against Mr. Baker storage for each month from the end of the season of 1920 clear down to September, 1921? A. Yes, sir.

Q. Well, you knew all the time that there was a controversy between Mr. Baker and Mr. Reid about the damages on these berries, didn't you?

(Testimony of O. L. Kennedy.)

A. Yes, sir.

Mr. SPENCER.—That is all.

JUROR.—About the first month's storage, was that $1.15 a month per barrel?

A. $1.15 per month per barrel, yes.

JUROR.—Do you know—someone testified here that included a freezing charge; it appears there was no freezing; was that an agreement, there should be such or is there a controversy over the fifty cents a month freezing charge?

A. We had an understanding with Mr. Baker as to the price of $1.15 a month the first month and sixty-five cents a barrel each month thereafter.

JUROR.—And $1.15, was that just for the storage, for handling the first month?

A. That covered all charges of handling in storage and freezing.

Q. (By Mr. SPENCER.) That covered a special item of freezing, didn't it?

A. Freezing and storage and handling the first month. [396]

Q. In 1920 you didn't have a freezer-room such as you—like you have got now? A. Yes.

Q. You had? You have got a room upstairs now that you have as a freezer that you put in your stuff and freeze it to a degree of some sixteen degrees? A. Yes.

Q. You didn't have that in 1920, did you?

A. Yes, we built that in 1920.

Q. You were not using it in the season of 1920?

(Testimony of O. L. Kennedy.)

A. Well, we were using it part of the time for berries.

Q. You didn't put these berries into that room then?

A. Yes, I think they went in. I am not sure of that; I didn't handle it.

Q. You don't undertake to say that these berries went into that freezing room in 1920, do you?

A. I am not saying that.

Q. But you had the freezing-room in 1920, did you? A. Yes, we built it in that year.

Witness excused.

Testimony of Hannis Loy, for Defendants (Recalled).

HANNIS LOY, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Loy, you have spoken about the re-processing of loganberries and as to the commercial value of berries in the condition these berries are in. I will ask you if you have re-processed berries in a similar condition and they were sold on the market?

A. In 1921 Mr. Fred—

Mr. SPENCER.—Now, if the witness has done so, I think, your Honor, he might be able to say so, but going into some other matter we don't know anything about—

(Testimony of Hannis Loy.)

COURT.—Say whether you have done so or not.

A. I have. [397]

Q. When? A. 1921.

Q. Were the goods in the same condition or similar condition to those of Mr. Baker's?

A. I would say they were in a worse condition than these berries when I examined them last year?

Q. And did you re-process those berries?

A. I did.

Q. What became of them after they were re-processed?

A. They were re-frozen and shipped and sold.

Q. Were they sold for as much as the market price of fresh berries? A. Not quite.

Q. What was the market price at that time of berries, generally?

A. These berries originally were sold at seven cents.

Q. What did these sell at that you re-processed?

A. At five cents.

JUROR.—What was the cost of re-processing?

A. About a cent a pound.

Cross-examination.

Q. How many of these berries did you handle that way? A. One carload.

Q. Sell them here? A. No, in Los Angeles.

Q. That was in 1921?

A. They were 1921 berries.

Q. Where did they come from? A. Salem.

Q. Who packed them?

(Testimony of Hannis Loy.)

A. Producers' Canning & Packing Company.

Q. Who?

A. Producers' Canning and Packing Company.

COURT.—Is that Mr. Kurtz' place? A. Yes.

Q. Got five cents for them? A. Yes.

Q. Do you know what the shrinkage was on them?

A. I could not say.

Q. You don't know?

A. There was a loss, of course, of the fruit that blew out of the barrels when the barrels blew.

Q. There was a loss of the barrels with that transaction?

A. No, we put in new heads. [398]

Q. Well, there was the work of re-coopering and putting in the heads?

A. Yes; I just told the jury approximately a cent.

Q. Cost of the sugar? A. Yes.

Q. What did sugar cost then?

A. Sugar cost then about—I think about $5.20. It was Central American sugar that we used.

Q. Did you get five cents here or five cents in Los Angeles?

A. Five cents here.

Q. How much sugar does it take for that re-processing?

A. It all depends on the condition of the fruit. Judge each barrel by itself.

COURT.—Did you get more than one shipment during 1921 from Mr. Kurtz?

(Testimony of Hannis Loy.)

A. I didn't get a shipment, I re-processed for Mr. Kurtz.

COURT.—Did the firm get more than one shipment that went from Mr. Kurtz, do you remember?

A. I could not say.

Q. (By Mr. SPENCER.) Wadhams & Kerr didn't handle that shipment? A. No, sir.

Q. You did it yourself? A. I did.

Q. Are you working with Wadhams & Kerr now?

A. No.

Mr. SPENCER.—That is all.

Witness excused.

Mr. BOOTHE.—I want to introduce those two jars.

(Jars containing samples taken from barrels in controversy received in testimony and marked Defendants' Exhibit "H" and Defendants' Exhibit "I," respectively.)

Testimony of E. L. Patton, for Defendants (Recalled).

E. L. PATTON, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination. [399]

(Questions by Mr. BOOTHE.)

Mr. Patton, there are two jars of fruit there in front of you, I think? A. Yes, sir.

Q. Did you get those out of the barrels?

A. Yes, sir.

Q. What barrels did you take them out of?

(Testimony of E. L. Patton.)

A. One was a barrel—there was two barrels we re-processed.

Q. The barrels that Mr. Loy re-processed?

A. Yes, sir.

Q. When did you take them out of the barrel?

A. It was Monday, I think.

Q. And you took one out of—one of those jars represents each barrel?

A. Each barrel, yes, sir.

Q. Can you tell which is which, now?

A. Yes, sir. This jar came out of a barrel that the head had blown out.

Q. How do you know?

A. I had the barrel numbered, also the jars numbered.

Q. Well, can you tell from looking at the berries which was which?

A. Yes, sir; this jar here—

Q. The jar that you hold in your left hand there you say you took out of the one that had its head blown off? A. Yes, sir.

Q. The one that you hold in your right hand is the one that had not blown out? A. Yes, sir.

Q. Now, can you tell one from the other by its looks—by their looks?

A. You can tell by the one with the head blown out, the berries are mashed up more; they are more in a jam state. This one here the berries hold together in better shape and are not mashed up so.

Q. Have you numbered them on the top there so you can tell which is the blown up? A. Yes, sir.

(Testimony of E. L. Patton.)

Q. And which was the one that wasn't blown up?

A. Yes, sir.

Q. What marks have you got on them?

A. The one, the damaged barrel, is marked number one and the barrel that is in good condition is marked number two. [400]

Mr. BOOTHE.—We offer these two jars in evidence as Jar No. 1 received in evidence as Defendants' Exhibit "H"; Jar No. 2 received in evidence as Defendants' Exhibit "I."

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Patton, you remember when Mr. Huntley and Mr. Baker went down into the basement over there and got samples for chemical analysis?

A. I remember them coming down and taking samples.

Q. Some complaint has been made because they said Mr. Reid was not notified; when you got these samples for the jars did you notify Mr. Baker what you were doing?

A. I didn't know anything about it.

Q. You didn't do it? A. No.

Q. Mr. Baker wasn't around when these samples were arranged for? A. I didn't see him.

Q. And so far as you know he wasn't told anything about it?

A. I don't know anything about that.

Witness excused.

Mr. BOOTHE.—That is all our evidence, your Honor.

Mr. SPENCER.—No rebuttal.

Whereupon recess was taken until 1:30 P. M.

Portland, Oregon, June 15, 1922.

AFTERNOON SESSION.

Now, at this time, the Court and jury having heard the argument of counsel for the respective parties, the Court delivered to the jury the following instructions:

Instructions of Court to Jury.

COURT.—Now, gentlemen of the jury, as you are already [401] advised, this action is brought by Mr. Baker against the National Ice and Cold Storage Company to recover damages alleged to have been suffered by him on account of the negligence and carelessness of the defendant company in failing to maintain in their cold-storage plant a proper refrigeration temperature.

It appears that during the year 1920 Mr. Baker delivered to this company a considerable quantity of loganberries in barrels and that the company received these barrels for the purpose of keeping them in cold storage; that there now remains of the barrels delivered by Mr. Baker 398, containg 170,156 pounds of loganberries. That much is admitted. It is also admitted by the defendant that it received these berries for cold-storage purposes.

Mr. Baker alleges in his complaint that while the defendants received these berries for the purpose of putting them in cold storage and keeping them in such a room under such a temperature as would preserve them, that it failed and neglected to do

so, but allowed the temperature to rise and remain at that stage such a length of time that the berries spoiled and are now of no commercial value.

It is alleged in the complaint that during that season of 1920 and the fall of the year, that berries —the market price of loganberries was seventeen and a half cents a pound and he therefore asks judgment against the defendants for the full value of these berries at seventeen and a half cents a pound, or an amount of $29,770.30.

The defendants deny by their answer that the loss of these berries was due to their negligence or carelessness on their part.

Now, as I have already said, the defendants were engaged in the cold-storage business and they received these goods— [402] admittedly received these goods for the purpose of keeping them in cold storage. If there was an understanding or agreement between them and Mr. Baker as to the temperature under which the room should be kept in which the goods were stored, then the defendants were under obligations to maintain that temperature, and if they did not do so and by reason of their negligence the goods were damaged or spoiled, Baker is entitled to recover from them the damages sustained by him.

If, on the other hand, there was no particular agreement as to the temperature which should be maintained in the storage-room, the defendants were bound to use such care in that respect as was ordinarily used by people engaged in that business and to maintain during the time these

goods were on storage the necessary temperature required and ordinarily used by people in the business, to preserve the berries, and if they failed and neglected to do so and by reason of that fact the goods were injured or spoiled, they are liable to Mr. Baker, the storer and the owner, therefor.

Now, there is a question in this case, and a question of fact, of course, as to the condition of the goods at the time they were received, and that is for you to determine, and that may have some bearing upon the question as to whether they were damaged or injured by reason of the negligence or carelessness of the defendant company or its failure to maintain a proper temperature in the storage room.

If the berries were in good condition at the time they were delivered to the defendant company and are not now in good condition, the burden would be on the defendants to show that their present condition is not due to their fault. If, on the other hand, they were not in good condition at the time of their [403] delivered and you believe from the evidence that the failure of the defendant company to maintain the proper temperature in the room, if they did so fail, did not cause the damage, then of course, you ought not to allow the plaintiff therefor.

Now, this is a question of fact in the case. The evidence is before you. It is apparent, and it is admitted, that from the first of August until some time later—and I don't undertake to tell the exact dates, because you will remember that—but from the first of August until some time later the tem-

perature in this room was equal to or perhaps above freezing; and whether that is a temperature that a cold-storage company ought to maintain for the purpose of preserving goods left with them—perishable goods left with them for that purpose, is, of course, a question of fact for you to determine; and if it was not and damage results therefrom the defendants are liable for such damage.

Now, this is a question, as I have said, of fact for you. There is some conflict in the testimony about the character of these goods and the condition of them when they were delivered. That is for you to determine; reconcile the testimony in conflict, if you can. If not, come to such a conclusion as to you seems most reasonable and probable under all the circumstances of the case, applying to the testimony your own experience and common observation.

If you find in favor of the plaintiff and that he is entitled to recover, then it will be necessary for you to find the amount of such recovery; and the measure of damages is the difference—will be the difference between the market price of these goods during the fall of 1920, at the time they would have moved if they had not been damaged, if they were damaged—if they had been in good condition they would [404] have moved during that time, according to the testimony—and the market value—the difference between the market value of the recovery. If the goods were entirely worthless for human consumption and as a commercial commodity, then the plaintiff would be entitled, if the de-

fendants are liable at all, to their full value; if they were not, if they had some commercial value, that should be deducted from the amount of the damage.

Then, in addition to that it is admitted that there is a storage charge. Mr. Baker agreed to pay storage on these goods, $1.15 a barrel for the first month and sixty-five cents a barrel for the remaining months. That should be deducted from any amount that you may find in favor of Mr. Baker, if you should find in his favor, up to the time that the goods would have moved in the ordinary course of business.

Now, I don't know of any other question of law involved in this case. It is a pure question of fact for you to determine from the testimony.

JUROR.—May I ask a question.

COURT.—Yes, sir.

JUROR.—I would like to ask in regard to this stipulation on the back of these warehouse receipts.

COURT.—That has nothing to do with the issues in this case. There is a stipulation on the back of the warehouse receipts that, as I understand it, exempts the company from liability for certain damages from certain causes, but not for their own failure to maintain proper temperature in the storage room.

JUROR.—Will you state in regard to the taxes, the taxes they paid?

COURT.—That is not in issue in this case at all.

JUROR.—It is not? [405]

SECOND JUROR.—There would have been no taxes if they had moved.

COURT.—That is not in issue here. There are two forms of verdict have been submitted, one by the plaintiff, leaving the amount to be filled, that you may use, if you find in his favor, for any amount at all; the amount to be filled in by you. The other is a verdict by the defendant, leaving a similar blank. If you think the damages do not—if you think Baker is damaged at all and the damages do not exceed the storage charges, then of course, your verdict would be for the defendant.

If, on the other hand, you think the damages do exceed the storage charges, then your verdict would be in favor of the plaintiff for the difference.

JUROR.—Just make out a verdict on one of these?

COURT.—Yes, that is all; just one.

Whereupon the jury retired to consider of its verdict. [406]

Plaintiff's Exhibit No. 3.

Chicago Office:
130 North Wells Street,
With C. L. Jones & Co.

Boston Office:
131 State Street,
With C. L. Jones & Co.

H. A. BAKER,
Canneries at Puyallup and Lynden, Washington, and Salem, Oregon.

Tacoma, Washington.
322 Tacoma Bldg.
July 15, 1920.

The National Ice & Cold Storage Company,
Portland, Oregon.

Gentlemen:

We are storing barreled goods with you, and wish you would wire this office at any time any of the barrels show distress. Should any of them commence to bulge at the head, take a 6 or 8 penny nail, drive it through the head three or four times, withdrawing it and allowing the gas to escape—and at all times notify me and Van Doren.

Yours very truly,
H. A. BAKER,
HAB.

HAB:C.

Filed June 15, 1922. G. H. Marsh, Clerk. [407]

Plaintiff's Exhibit No. 4.

WESTERN UNION TELEGRAM.

Received at

76 Third Street, Cor. Oak, Portland, Oregon.

August 16, 1920. 9:15 P.M.

Bellingham, Wash.

National Cold Storage and Ice Co.

Portland, Oregon.

VanDoun wires me that temperature of room is up to thirty-six you know you will be liable for any loss at this temperature each barrel is worth about seventy dollars I beg you to get the temperature down to twenty-six or lower will ship out very fast now but barrels should be cooled to twenty-six before loading.

H A BAKER.

Filed June 15, 1922. G. H. Marsh, Clerk.

Plaintiff's Exhibit No. 5.

TELEGRAM.

POSTAL TELEGRAPH CO. 2–02 PM.

Portland, Ore., August 21, 1920.

H. A. Baker, 322 Tacoma Building,

Tacoma, Wash.

Temperature basement now 27 bubbling stopped floor clean have taken refrigeration off ice tank to do this expect 25 degrees to-morrow.

NATIONAL COLD STORAGE & ICE CO.

Filed June 15, 1922. G. H. Marsh, Clerk.

[408]

Plaintiff's Exhibit No. 6.

STATEMENT.

NATIONAL COLD STORAGE & ICE CO.
309 East Washington Street,
Portland, Oregon, Oct. 31, 1920.

H. A. Baker,
Salem, Oregon.

Sept.	30	To balance	2687.54
Oct.	1	" Storage	142.45
	3	.....	1.95
	4	.....	28.60
	5	.....	3.90
	8	.....	.65
	9	.....	20.15
	10	.....	7.80
	12	.....	2.60
	13	.....	5.85
	14	.....	.65
	15	.....	1.30
	16	.....	13.00
	18	.....	8.45
	20	.....	.65
	21	.....	1.30
	23	.....	4.55
	27	.....	11.05
	28	.....	12.35
			$2954.79

[409]

Defendants' Exhibit "A."

Chicago Office:
130 North Wells Street,
With C. L. Jones & Co.

Boston Office:
131 State Street,
With C. L. Jones & Co.

H. A. BAKER.
Canneries at Puyallup and Lynden, Washington, and Salem, Oregon.

Tacoma, Washington,
322 Tacoma Building.
September 7, 1920.

National Ice & Cold Storage Company,
Portland, Oregon.

Gentlemen:

I wish you would kindly write me to the effect that you will assume the loss, due to fermentation on loganberries received by you this year from me in good condition. This is simply to confirm my conversation with Mr. Read, which I had when last in Portland—covering loss sustained by reason of the temperature in room being allowed to go up to 36. Mr. Read stated at the time that there would be no equivocation. That he would speak to his father and forward me this assurance. It is my intention to make this loss just as light as possible, and an agreement on both sides will help the matter very materially.

I wish you would load out one car containing all the strawberries which I think amount to 42 or 43 barrels, and sufficient loganberries to make up 100 barrels. This car to be shipped open billing to H. A. Baker, care Western Cold Storage Company, 16th and State Streets, Chicago. Be very careful about having the car thoroughly braced and iced and salted. Also be very careful that every barrel that is placed in this car is in perfect condition. All barrels that have been vented should be plugged again and the heads cleaned up, also the sides of the barrels, so that they will not have the appearance of having been in distress.

Wire Van Doren when ready.

You will kindly notify Van Doren, so that he may be with you when this car is loaded—and I am writing him to that effect.

Yours very truly,

H. A. BAKER,

HAB.

HAB:C.

P. S.—On second thought, I want you to cut down the temperature in that room to 24 for two days before this car goes out.—H. A. B.

Filed June 15, 1922. G. H. Marsh, Clerk. [410]

Defendants' Exhibit "B."

Wm. Reid, President.
Wilbur P. Reid, Treas. and Manager.

NATIONAL COLD STORAGE & ICE CO.
Office 309 East Washington Street,
Portland, Oregon, September 10, 1920.

Cold Storage Warehouse.
Manufacturers
and Wholesale Ice Dealers.

H. A. Baker,
322 Tacoma Building,
Tacoma, Washington.

Dear Sir:

In reply to your letter of the 7th instant, regarding loss on loganberries, we wish to state that we cannot agree to assume all the loss due to fermentation as proposed by you, for the reason that many of the barrels were in bad condition when received by us; in many instances a number of barrels blew before we could get them unloaded from trucks and transferred to the basement.

Many of the barrels were filled too full and the hot temperature of the outside atmosphere caused gas to form thereby resulting in distressed barrels. The fermentation started before going into cold storage. Therefore it would be impossible for us to ascertain just what amount of loss was due to our letting temperature get above freezing point for a few days.

We will admit that at the time you inspected the goods the temperature was higher than it should

have been and that the barrels showed fermentation but we at once reduced the temperature to 26 degrees and we have held it at this or colder which has stopped fermentation and they now seem to be in good condition. The temperature is now 24 degrees and the barrels are now ready for shipment, and as per your order for Chicago, a car has been ordered and we are assured the spotting of this car for loading on Saturday the 11th. As soon as we know definitely, we will wire Mr. Van Dorn. [411]

We are willing and want to be fair towards adjusting any loss that we are responsible for but cannot accede to your demand to assume all the loss due to fermentation. The depreciation to contents of barrels will not amount to much as they were frozen most of the time except for a day or two.

Now in regard to your request of the 8th inst., relative to lost negotiable warehouse receipt #180, covering 100 barrels loganberries issued to T. J. Station, Chicago; before issuing a duplicate copy of this, we wish to have a lost certificate from Mr. Station. It may be possible that he has endorsed this to some other party who will claim the delivery of said goods. We are writing Mr. Station today.

Very truly yours,

NATIONAL COLD STORAGE & ICE CO.

WILBUR P. REID, Manager.

R/S.

Filed June 15, 1922. G. H. Marsh, Clerk. [412]

Defendants' Exhibit "C."

Wm. Reid, President,
Wilbur P. Reid, Treas. and Manager.
NATIONAL COLD STORAGE & ICE CO.
Office 309 East Washington Street,

Portland, Oregon, Sept. 16, 1920.

H. A. Baker, 322 Tacoma Building,
Tacoma, Washington.

Dear Sir:

Yours of the 11th inst. to hand and in answer thereto, we wish to say that we cannot assume the loss as mentioned in your letters of September 7th and 11th.

We have fully explained our position in our letter of the 10th, to the effect that we are willing and want to be fair toward adjusting any loss that we are responsible for. You say that this can only be done by our assuring you that we will assume the loss. This would harmonize matters entirely in your favor but not for us.

The proper time for adjustment will be after said goods are disposed of, when the actual loss can be determined and at that time we will take up the matter of adjusting any loss which you claim to have sustained on account of our not properly handling the goods while in storage.

Loganberries are a very difficult commodity to handle and when the barrels were received at our plant, a great many were blowing and bursting, others were fermenting and heads of barrels bulging, so nail holes were made to relieve the gas pressure but notations were not made on the re-

ceipts at the time and we do not wish you to assume that all barrels were received in good condition. [413]

Car containing 40 barrels strawberries and 60 barrels loganberries left on the 14th September for Minnesota Transfer. Mr. VanDorn was here and checked same finding all the barrels in good condition. Have been unable to get car for Chicago but expect car by to-morrow. We will wire Mr. VanDorn as requested.

Yours truly,
NATIONAL COLD STORAGE & ICE CO.
WILBUR P. REID, Manager.

R/S.

Filed June 15, 1922. G. H. Marsh, Clerk.

Defendants' Exhibit "D."

August 9, 1920.

H. A. Baker,
Salem, Oregon.

Dear Sir:

We have on hand now about 50 bbls. that have blowed and as we have orders to ship these out we suggest that you send your men here to re-cooper and put them in shape for shipping.

Out of the last 31 received here, 11 have blowed and 1 that came in last night was a total loss.

Yours truly,
NATIONAL COLD STORAGE & ICE CO.,
Manager.

K/S.

Filed June 15, 1922. G. H. Marsh, Clerk. [414]

Defendants' Exhibit "E."

Chicago Office:
130 North Wells Street,
With C. L. Jones & Co.

Boston Office:
131 State Street,
With C. L. Jones & Co.

H. A. BAKER,
Canneries at Puyallup and Lynden, Washington, and Salem, Oregon.

Tacoma, Washington,
322 Tacoma Building.
August 25, 1920.

National Cold Storage & Ice Company,
Portland, Oregon.

Gentlemen:

Acknowledging your favor of August 24th, beg to advise that the temperature of 27, will, I think be satisfactory, but very careful to keep the temperature at least as low as that. As soon as I have an opportunity, I will remove some of the stock.

In the meantime, it will be necessary to re-weigh all of these barrels as undoubtedly from 5 to 10# has oozed out of each, owing to fermentation, caused by the high temperature which you allowed to occur.

The cancelling of the warehouse receipt is perfectly correct.

Yours very truly,
H. A. BAKER,
HAB.

HAB:C.

Filed June 15, 1922. G. H. Marsh, Clerk. [415]

Defendants' Exhibit "F."

Chicago Office:
130 North Wells Street,
With C. L. Jones & Co.

Boston Office:
131 State Street,
With C. L. Jones & Co.

H. A. BAKER,
Canneries at Puyallup and Lynden, Washington, and Salem, Oregon.

Tacoma, Washington,
322 Tacoma Bldg.
Sept. 11, 1920.

The National Ice & Cold Storage Company,
Portland, Oregon.

Gentlemen:

Answering your kind favor of September 10th, beg to advise that I did not expect you to assume any liability for loss from fermentation when barrels were received in bad condition by yourselves. Of course, this would be indicated by the receipts, as you should, and undoubtedly did, indicate on the receipts all berries that arrived in poor condition. That being the case, I wish you would write me a letter that you will assume any loss from fermentation on all loganberries other than those received in bad condition and so indicated on the receipt.

This I must insist upon before moving these loganberries—otherwise, I shall take the matter into court and I fear if the health authorities get a hold

of it, it will be serious. As it is, I hope to make the claim a comparatively light one. It is rather unfortunate that you shipped any loganberries at a time when the temperature was running from 33 to 36. That is what is now causing trouble in the East, as indicated by the car shipped to Durand & Kasper. However, I am handling the matter there to the best of my ability and for your interest—as I could, if I so desired, throw the whole responsibility upon you. I trust, and expect that you will work in harmony to make this loss as light as possible, and this can only be done by you assuring me that you will assume this loss. This must be in writing. Kindly attend to this at once.

You may ship one car of loganberries to Durand and [416] Kasper, care of the Western Cold Storage Company, Chicago,—open bill of lading, usual precautions for bracing and icing. Use very, very, very great care to see that this car is in perfect condition, and that the barrels are thoroughly washed, marked and re-plugged, so that there can be no suspicion of trouble. You understand that this is absolutely necessary for the reason that Durand and Kasper are now on the alert for trouble. I am writing J. L. Van Doren that you will wire him when you are ready to load this car out, that he may personally inspect it. This is absolutely necessary.

Yours very truly,

H. A. BAKER.

H.A.B.:C.

Filed June 15, 1922. G. H. Marsh, Clerk. [417]

Defendants' Exhibit "G."

Baker's "DEWKIST"
Washington Fruits.

H. A. BAKER,
INCORPORATED.

H. A. Baker, President,
A. W. McCoy, Vice-President,
N. H. Kelley, Treasurer.

Factory at Sumner, Washington.

Tacoma, Washington.
322 Tacoma Building,
Oct. 5, 1920.

National Ice & Cold Storage Company,
Portland, Oregon.

Gentlemen:

I wish you would raise the temperature of the room in which our fruits are stored to about 24 or 25. We expect some bursting of the heads in the barrels, which is certainly much more satisfactory than having them leak—as we know when the bursting is caused by expansion that they are frozen.

Again referring to the warehouse receipts requested by Wagstaffe—it seems that they do not want the warehouse receipt covering loganberries issued to Station. They want warehouse receipt covering 100 barrels loganberries which were sold them on August 14, 1919. If you will look up your records you will find that on August 9th, we shipped 85 barrels to them. On August 14th we transferred warehouse receipts on 100 barels. On August 26th,

we shipped a car of 90 barrels, and on October 18th, warehouse receipt was issued to Station for 100 barrels. Please advise me at once whether or not by mistake you shipped the 100 barrels, warehouse receipt for which was issued August 14th, in place of the 100 barrels to Station, which I think was later transferred to Wagstaffe. Have you still 100 barrels in stock from last year, or have you 200 barrels? Kindly give me this information.

Yours very truly,

H. A. BAKER. INC.

HAB.

H.A.B.:C.

Filed June 15, 1922. G. H. Marsh, Clerk. [418]

Plaintiff's Exhibit No. 3.

(To Deposition of H. Theis.)

NATIONAL COLD STORAGE & ICE CO.

Office: 309 East Washington Street.

Cold Storage Warehouse Manufacturers and Wholesale Ice Dealers.

Portland, Oregon, Nov. 17, 1920.

John Sexton & Company,

Illinois & Kingsbury Sts.,

Chicago, Ill.

Gentlemen:

Complying with the request in your letter of the 9th instant, we have shipt to you, 100 bbls of loganberries in PFE 14062, as per the B/L enclosed,

having followed your instructions in regard to icing and routing.

We are returning herewith our warehouse receipt #224, which shows the endorsement of 100 bbls. shipt.

We are also returning the schedule of barrels which should be attached to said receipt, which shows the numbers of the barrels shipt as checked in red.

Trusting this shipment will arrive in good condition,

We are,

Yours truly,

NATIONAL COLD STORAGE & ICE CO.

By O. L. KENNEDY. [419]

SHEET No. 1.

PLAINTIFF'S EXHIBIT No. 3.

(To Deposition of H. Theis.)

Schedule of barrels of berries transferred to John Sexton & Co.

Bbl. No.	Gross	Tare	Net	Bbl. No.	Gross	Tare	Net
			Fwd.		23889	2572	21317
288	485	51	434	391	483	56	427
290	498	55	443	392	497	48	449
√296	475	52	423	388	484	59	435
√297	485	52	433	√394	480	51	429
√304	487	56	431	√396	487	54	433
√305	472	52	420	√397	483	51	432
312	486	55	431	√395	478	47	431
√314	477	52	425	√403	466	50	416
√316	483	52	431	404	474	55	419
√317	489	56	433	√401	454	50	404
√323	493	54	439	√410	466	56	410
324	474	45	429	√414	472	52	420
325	485	48	437	√415	489	52	437
326	475	50	425	√416	473	49	424
329	464	48	416	√413	481	54	427
√334	462	52	410	√417	450	52	398

√336	464	53	411	√405	453	49	404
√337	450	55	395	√406	463	54	409
338	487	52	435	√400	492	52	440
341	453	54	399	√418	479	55	424
√344	453	51	402	√419	490	54	436
345	499	52	447	√421	440	56	384
√347	434	51	383	√423	430	51	379
349	496	52	444	424	463	54	409
350	481	53	428	√420	472	54	418
√351	479	54	425	√425	481	54	427
√346	470	55	415	428	477	54	423
353	483	52	431	√430	473	56	417
√355	479	52	427	√432	475	55	420
√357	475	49	426	√433	474	54	420
√359	475	49	426	√434	464	52	412
361	483	49	434	√435	485	55	430
√362	480	50	430	√436	485	47	438
√363	471	52	419	438	475	54	421
√364	469	54	415	√439	458	55	403
√367	466	47	419	√440	478	54	424
√366	469	57	412	√441	465	54	411
√365	479	49	430	√442	469	52	417
√358	485	50	435	√443	461	52	409
√372	477	47	430	444	490	56	434
375	482	50	432	√445	476	55	421
√376	479	52	427	√446	487	59	428
377	489	49	440	448	473	50	423
√378	478	48	430	√449	490	53	437
379	488	53	435	√451	461	54	407
√380	484	48	436	√452	468	54	414
√381	483	49	434	√455	469	56	413
√383	478	52	426	474	485	53	432
385	490	53	437	√477	486	52	434
386	491	49	442	√479	486	52	434
	23889	2572	21317		47579	5229	42350

[420]

SHEET No. 2.

PLAINTIFF'S EXHIBIT No. 3.

(To Deposition of H. Theis.)

Schedule of barrels of berries transferred to John Sexton & Co.

Bbl. No.	Gross	Tare	Net	Bbl. No.	Gross	Tare	Net
V 463	466	54	412	V 753	482	55	427
480	480	53	427	764	491	52	438+1
V 484	484	52	432	766	482	50	432
V 485	478	51	427	801	477	54	423
486	462	55	407	802	480	54	426
V 488	474	52	422	V 806	448	56	382+10
489	472	52	420	805	478	53	425
490	486	53	433	857	464	50	414
V 494	484	56	428	859	456	54	402
495	480	57	423	872	490	51	439
V 497	460	50	410	859	456	54	402
498	475	53	422	860	459	49	410
496	484	55	429	861	468	54	414
502	482	50	430	862	449	49	400
V 503	466	52	414	863	434	50	384
V 504	472	54	418	865	468	52	416
V 509	486	50	436	858	434	49	385
V 510	485	49	436	888	489	48	441
511	482	52	430	891	487	52	435
514	480	52	428	892	489	50	439
599	474	53	421	894	492	54	438
V 600	484	55	429	895	501	53	448
V 604	484	50	434	804	478	51	427
V 606	470	50	420	V 594	466	51	415
V 653	458	48	410	V 642	481	49	432
V 666	486	52	434	911	448	48	400
665	496	57	439	921	476	47	429
V 647	462	47	415	922	495	54	431+10
V 675	471	52	419	924	497	54	443
V 643	486	54	432	926	490	54	434+2
V 659	490	50	440	928	486	50	436
676	482	51	431	931	481	49	432
V 645	472	51	421	945	470	49	421
674	478	52	426	948	470	54	416
677	466	51	415	946	480	51	429
V 683	476	54	422	953	484	54	430

√698	467	51	416	954	493	56	437
√703	493	54	439	955	486	52	434
704	480	54	426	940	474	54	420
√706	448	53	395	952	487	53	434
758	479	49	430	978	488	48	440
760	481	50	431	980	470	52	418
762	495	51	424	981	482	53	429
761	490	53	437	982	470	52	418
776	487	54	433	983	466	53	413
786	447	52	395	984	476	54	422
799	469	54	415	987	482	52	430
770	497	49	448	989	464	52	412
782	489	55	438	√993	470	59	411
765	489	52	437	996	461	54	407
	23884	2606	21278		47629	5208	42421

Summary

Sheet #1	47579	5229	42350
" 2	47629	5208	42421
	95208	10437	84771

Numbers checked √ red shipt in PFE 14062

[421]

Plaintiff's Exhibit No. 4.

(To Deposition of Peter J. Slaughter.)

Chicago Office:
130 North Wells Street,
C. L. Jones & Co.

Factories at
Puyallup, Washington,
Lynden, Washington.
Salem, Oregon.

FRUIT CONTRACT.

H. A. BAKER.

Date January 8, 1920,

Sold to Durand & Kasper Company, of Chicago, Ill.

Through C. L. Jones & Company, of Chicago, Ill.

Quantity	Package	Variety of goods	Price per lb.	Price per gal.	Price per doz.
1	car	2x1 Loganberries at packer's opening price. f. o. b. cold storage Pacific Coast 1920 pack two pounds fruit to one of sugar no preservatives—no ice			

DURAND & KASPER CO.

Accepted by PETER J. KASPER,
Buyer,

Accepted C. L. JONES & CO.,
Brokers.

H. A. BAKER,
Seller.

By N. H. KELLEY. [422]

AND AFTERWARDS, to wit, on the 12th day of December, 1922, there was duly filed in said court a stipulation to send certain original exhibits to Court of Appeals as part of bill of exceptions, in words and figures as follows, to wit: [423]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Stipulation to Send Certain Original Exhibits to Circuit Court of Appeals as Part of Bill of Exceptions.

IT IS HEREBY STIPULATED and AGREED between the parties hereto that the Clerk of this Court in preparing a transcript of the complete record in the above-entitled cause may omit therefrom the various shipping receipts or bills of lading for goods shipped to Chicago offered in evidence as exhibits, but that the originals of said exhibits may be attached to the transcript and thereby become a part thereof.

IT IS ALSO STIPULATED that the two jars of fruit which were offered in evidence as exhibits on the part of the defendants have by mutual consent been destroyed and they are not to be considered on this appeal.

OMAR C. SPENCER,
Of Attorneys for the Plaintiff.
J. F. BOOTHE,
Attorney for the Defendants.

Filed December 12, 1922. G. H. Marsh, Clerk. [424]

AND AFTERWARDS, to wit, on Tuesday, the 26th day of December, 1922, the same being the 43d judicial day of the regular November term of said Court.—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following procedings were had in said cause, to wit: [425]

In the District Court of the United States for the District of Oregon.

No. L—8858.

December 26, 1922.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants

Minutes of Court—December 26, 1922—Order to Send Certain Original Exhibits to Circuit Court of Appeals as Part of Bill of Exceptions.

Now at this time, upon considering the stipulation of the parties to this action to the effect that the shipping receipts or bills of lading for goods shipped to Chicago offered in evidence as exhibits, may not be copied in the transcript, but that the originals may be attached to the transcript and become a part thereof,

IT IS THEREFORE ORDERED that the clerk of this Court, in preparing the transcript of said cause to be transmitted to the Circuit Court of Appeals for the Ninth District, may omit printing in the transcript said exhibits, but the originals of all of said exhibits may be attached to the transcript by the Clerk and be considered by the Court of Appeals as a part of said transcript.

IT IS FURTHER ORDERED that the two jars of fruit offered as exhibits by the defendants which, having been by mutual consent destroyed, are not to be considered in the Appellate Court.

ROBERT S. BEAN,
Judge.

Filed December 26, 1922. G. H. Marsh, Clerk.
[426]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do herby certify that the foregoing pages numbered from three to 426, inclusive, constitute the transcript of record upon writ of error to the said court in a case in which H. A. Baker is plaintiff and defendant in error and William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, are defendants and plaintiffs in error; that said transcript of record has been prepared by me in accordance with the praecipe for transcript filed by the said plaintiff in error and is a true and complete transcript of the record and proceedings had in said court in said cause which the said praecipe directed to be included therein as the same appear of record and on file at my office and in my custody.

That I return with the said transcript of record the original writ of error issued in said cause and the original citation filed therein.

I further certify that the cost of the foregoing transcript is $125.60 and that the same has been paid by the said plaintiff in error.

In testimony whereof, I have hereunto set my hand and caused the seal of said court to be affixed,

at Portland, in said District, this 29th day of December, 1922.

G. H. MARSH,
Clerk United States District Court for the District of Oregon. [427]

[Endorsed]: No. 3965. United States Circuit Court of Appeals for the Ninth Circuit. William Reid and Wilbur P. Reid, Partners Doing Business Under the Firm Name and Style of National Cold Storage and Ice Company, Plaintiffs in Error, vs. H. A. Baker, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed January 2, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk. [428]

In the District Court of the United States for the District of Oregon.

No. L—8858.

December 14, 1922.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Order Extending Time to and Including December 30, 1922, to File Record and Docket Cause.

Now, at this time, for good cause shown, it is ORDERED that the time for filing the transcript of record in this cause and docketing the same in the United States Circuit Court of Appeals be and the same is hereby extended to and including December 30, 1922.

WM. B. GILBERT,
Judge.

[Endorsed]: No. 3965. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including December 30, 1922, to File Record and Docket Cause. Filed Dec. 18, 1922. F. D. Monckton, Clerk. Re-filed Jan. 2, 1923. F. D. Monckton, Clerk.

In the District Court of the United States for the District of Oregon.

December 29, 1922.

H. A. BAKER,

Plaintiff,

vs.

WILBUR REID et al., Partners as NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Order Extending Time to and Including January 3, 1923, to File Record and Docket Cause.

Now, at this day, for good cause shown, it is ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals be and the same is hereby extended to and including January 3, 1923.

R. S. BEAN,
Judge.

[Endorsed:] No. 3965. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including January 3, 1923, to File Record and Docket Cause. Filed Jan. 2, 1923. F. D. Monckton, Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM REID and WILBUR P. REID, Partners
Doing Business Under the Firm Name and
Style of National Cold Storage
& Ice Company,
Plaintiffs in Error,

vs.

H. A. BAKER,
Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court for the District of Oregon.

J. F. BOOTHE, Esq.,
Attorney for Plaintiff in Error.

CLARK, MIDDLETON, CLARK & SKULASON,
Of Counsel for Plaintiffs in Error.

CAREY & KERR, and OMAR C. SPENCER,
Attorneys for Defendant in Error.

F. W. BALTES AND COMPANY, PRINTERS

SUBJECT INDEX

CASE INDEX

Note: At the time this brief was prepared and printed the transcript had not been printed, and printed copy was not before counsel for plaintiff in error, hence pages of transcript referred to are left blank and will be filled before argument of case.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM REID and WILBUR P. REID, Partners
Doing Business Under the Firm Name and
Style of National Cold Storage
& Ice Company,
Plaintiffs in Error,

vs.

H. A. BAKER,
Defendant in Error.

Brief of Plaintiffs in Error

STATEMENT OF THE CASE

This case arises upon a writ of error to the District Court for the District of Oregon upon a judgment rendered in that Court upon verdict of the jury, and brings here for review the action of that Court on rulings in respect of the admission of evidence and overruling a motion for a directed verdict made by the plaintiffs in error.

The defendant in error, H. A. Baker, plaintiff in the Court below, brought this action against the plaintiffs in error, defendants in the Court below, in the District Court for the District of Oregon. The amended complaint alleged the necessary diversity of citizenship and the jurisdictional amount in controversy. It was further alleged that during the months of July and

August, 1920, Baker was the owner of 398 barrels of loganberries, weighing 170,156 pounds, and during said months delivered to and stored the berries with the plaintiffs in error; that the plaintiffs in error accepted the berries for storage, and undertook and agreed to store and keep them in proper state of refrigeration so that the same would not ferment or deteriorate, for which the defendant in error agreed to pay certain storage rates; that the plaintiffs in error failed and neglected to keep the berries in a proper state of refrigeration; that the temperature of the storage room where the berries were stored was permitted to go above the freezing point, so that the berries fermented, as a result of which they became worthless and their market value was destroyed; that the berries were to be removed from the place of storage by the defendant in error, during the Fall of 1920; that during said time the market value of the loganberries, had they been kept in a proper state of refrigeration, was seventeen and one-half (17½c) cents per pound; that the loganberries were not removed by the defendnat in error in the Fall of 1920 because their market value had been destroyed. It is not alleged that they were ever thereafter taken out of the possession of plaintiffs in error, and it appears from the evidence given on the trial that they were not. The amended complaint further alleges that the defendant in error has been damaged to the full amount of the alleged market value of the berries, to-wit, 17½ cents per pound for the 398 barrels, or 170,156 pounds mentioned in the complaint.

It will be observed that the complaint states that 398 barrels of loganberrie, containing a specified num-

ber of pounds, were delivered to and stored with the plaintiffs in error in July and August, 1920, and that these were damaged and the value destroyed by alleged lack of refrigeration. It is for the damage to this specified quantity, and this quantity alone, that this action was brought. There is no allegation or suggestion in the amended complaint that any other berries were delivered for storage by the defendant in error to the plaintiffs in error, or that any other berries stored by him were damaged by lack of refrigeration or other cause.

The answer of the plaintiffs in error to the amended complaint admits the diversity of citizenship of the parties, the jurisdictional amount in controversy and that the plaintiffs in error were doing business as copartners. It was also admitted that during the months of July and August, 1920, Baker, the defendant in error, delivered to and stored with the plaintiffs in error in Portland, Oregon, 398 barrels of loganberries, amounting to approximately 170,156 pounds; that for a consideration agreed on, the plaintiffs in error agreed to store and to use in respect thereof such ordinary care as prudent persons in the cold storage business were accustomed to use in the storage of such property, and to deliver the same to the defendant in error whenever requested so to do, subject to certain contingencies not here material. The answer further alleged that the berries were of a perishable nature; that before being delivered to the plaintiffs in error at their warehouse in Portland, the berries had been hauled a long distance in warm weather in auto trucks, and that more than one-half of the number of barrels delivered were at the time of delivery fermenting, and some of the barrels were

bursting and blowing up; that upon receipt of the berries, the plaintiffs in error placed them in their cold storage plant and kept them in a condition of refrigeration sufficient to preserve them if in good condition when delivered, except as to the natural deterioration and decay inherent in property of that character; that about the 13th of August, 1920, the defendant in error for the first time suggested to the plaintiffs in error that a temperature of twenty-four degrees above zero be maintained where the berries were stored, and that thereafter the plaintiffs in error maintained such temperature; that the berries at all times had been and were in as good condition as when placed in storage, apart from the natural deterioration inherent in the berries themselves; that if the loganberries were in damaged condition, that fact was due to the negligence of the defendant in error in permitting them to ferment and become damaged prior to the time they were placed in the storage house of the plaintiffs in error.

By way of counterclaim, the plaintiffs in error alleged in substance that in 1920 and 1921, the defendant in error stored the 398 barrels of loganberries referred to and other property with the plaintiffs in error, at the agreed price of $1.15 per barrel for the first month, and 65 cents per barrel per month thereafter; that up to September 30, 1921, storage charges had accrued to the amount of $5811.34, no part of which had been paid. Judgment was prayed against the defendant in error for the amount stated, with interest from September 30, 1921.

This action was brought on or about the 3rd of November, 1921.

The reply put in issue the various affirmative allegations of the answer except the allegation that certain storage charges had not been paid.

On the trial, the Court, over the objections and exceptions of counsel for the plaintiffs in error, permitted the defendant in error to testify in his own behalf in substance that in addition to the 398 barrels mentioned in the amended complaint, he had stored a great many other barrels of loganberries with the plaintiffs in error during the months of July and August, 1920; that of these additional berries, a small quantity had been shipped out by the defendant in error prior to August 1, 1920, to consignees in St. Louis and had arrived in good condition, and no claim had been made against him by the consignees in respect thereof; that several car loads had been shipped out by him after August 1, 1920, and during that month from the warehouse of the plaintiffs in error in Portland, Oregon, to Chicago and other Eastern points, and that these had arrived at the point of destination in bad condition, etc. The berries which were the subject of this testimony were no part of those mentioned in the amended complaint, were in no wise involved in this case and the evidence was directed to their condition after they had been transported during the month of August to a point or points some two thousand miles or more away from the warehouse of the plaintiffs in error.

At the conclusion of the evidence, the plaintiffs in error moved for a directed verdict upon grounds which appear in the assignments of error appearing later in this brief.

POINTS AND AUTHORITIES

I.

Where an action is tried to a jury, the erroneous admission of material evidence is always reversible error, unless it affirmatively appears, beyond doubt, that such error could not have prejudiced the rights of the party complaining thereof.

Mexia v. Oliver, 148 U. S. 664, 37 L. Ed. 602.

United States v. Honolulu Plantation Company, 122 Fed. 581, 583 (C. C. A. 9th Cir.).

Lancaster v. Collins, 115 U. S. 222, 29 L. Ed. 373.

Gilmer v. Higley, 110 U. S. 47, 28 L. Ed. 62.

Smugler Union Mining Co. v. Broderick, 25 Colo. 19, 71 Am. St. Rep. 108, 53 Pac. 170.

Henry v. Colorado Land Co., 10 Colo. App. 23, 51 Pac. 93.

II.

The admission of immaterial evidence in a trial before a jury which has a tendency to divert the attention of the jury from the precise issue involved; to introduce collateral issues; confuse the issues which are to be tried, or excite the prejudice of the jury. is reversible error.

Lucas v. Brooks, 85 U. S. 436, 454; 21 L. Ed. 779, 783.

Neudecker v. Kohlbert, 81 N. Y. 305.

10 R. C. L. 925, 926, 927.

Golden Reward Mining Co. v. Buxton Mining Co., 97 Fed. 413, 416.

III.

It was reversible error to admit the evidence to which plaintiffs in error objected and excepted.

10 R. C. L. 944.

22 Corp. Jur. 750, 751, 752, 753.

Campbell v. Russell, 139 Mass. 278, 1 N. E. 345.

Albany, etc., Co. v. Lundberg, 121 U. S. 451; 30 L. Ed. 982, 985.

Rehberg v. City of New York, 99 N. Y. 632; 2 N. E. 11.

Washington Twp., etc., Co. v. McCormick, 19 Ind. App. 663; 49 N. E. 1085.

Crossen v. Grandy, 42 Ore. 283, 286.

Bullock v. Lake Drummond Canal & Water Co., 43 S. E. 593.

Story v. Nidiffer, 146 Calif. 549; 80 Pac. 692.

Commonwealth v. Middleby, 187 Mass. 342; 73 N. E. 208.

ASSIGNMENTS OF ERROR

In connection with their petition for writ of error, the plaintiffs in error made and filed the following assignments of error:

"Come now the above named defendants appearing by J. F. Boothe, their attorney of record, and say that the judgment and final order of this Court made and entered in the above entitled Court on the 15th day of June, 1922, in favor of the plaintiff above named and against the defendants above named is erroneous and

against the just rights of the defendants, and file herein, together with their petition for Writ of Error from said judgment and order, the following Assignments of Error, which they aver occurred upon the trial of said cause:

(1) The Court erred in admitting evidence over the objections and exceptions of the defendants to the shipping of two or more carloads of loganberries from the defendants' cold storage plant in Portland, Oregon, to Chicago, Illinois, on and after the 4th of August, 1920, and to the testimony brought out before the jury concerning the condition of the loganberries so shipped on their arrival in Chicago.

(2) The Court erred in refusing, over the exception of the defendants, to direct the jury to bring in a verdict in favor of the defendants.

(3) The Court erred in overruling defendants' objections generally to a judgment in favor of the plaintiff for any sum of money and in not entering judgment as requested in their favor for the reason that the testimony properly supports a judgment in favor of the defendants.

(4) The Court erred in failing to enter a judgment for the defendants as requested and in not giving judgment in favor of the defendants for the dismissal of the plaintiff's complaint.

WHEREFORE, the said defendants and plaintiffs in error pray that said judgment of the District Court be reversed, with directions to the District Court to enter judgment in favor of the defendants."

In connection with consideration of paragraph (1) of the foregoing assignments of error, the following is quoted from the bill of exceptions:

"In support of the plaintiff's case and in order to show the damaged condition of the 398 barrels of loganberries, the subject of this action, the plaintiff, H. A. Baker, was called as a witness and was asked the following question:

'Now, what did you do toward attempting to save the product after this fermentation had been evident in it? What I mean is, did you sell it or undertake to ship it?' To which the witness answered: 'Why, we had then in transit five or six cars, I think four or five cars—five cars, we will say, that had been shipped out between the first of August, and when the difficulty arose, we will say the sixteenth of August. One of the cars that were shipped into Chicago——'

"At this point of the testimony the defendants, by their attorney, stated: 'Your Honor, I object to that, to this answer, and move to have it stricken out. That has nothing to do with these barrels that are in question. What we had shipped to Chicago had nothing to do with this, these particular goods we are dealing with, these 398 barrels that he says were in cold storage at that time.'

"Counsel for the plaintiff then stated: 'The fact of the matter is, Your Honor, it is our position in this case that the same treatment was given to all of the barrels as to those that were shipped out prior to about the first of August. I think there were about two cars which went out prior to the first of August. It was after the

first of August that the temperature went up to thirty-six degrees and stayed there some time, and it is our notion about it that the same thing happened, substantially, to all of those barrels of berries that were subject to that rise in temperature. My idea about it is that berries that were subjected to that, that went East and arrived in bad order are in just the same shape as these are here now in bad order.'

"The Court: 'You are not claiming—'

"Mr. Spenser: 'We are not claiming any damages for those that went East.'

"The Court: 'They were in there at the same time. He may answer.'

"Mr. Spenser: 'We are not claiming any damages to those that went East at all, because they were sold to other people.'

"Mr. Boothe: "Note an exception.'

"The witness then answered: 'The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about fifty and sixty per cent; I understand there was about one hundred barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty or sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad condition and those that were shipped arrived after that—between that time and when I stopped them, when

I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation.

"Question: 'You shipped, as I understand your earlier statement, two cars prior to August first?'

"Answer: 'Two cars were shipped to St. Louis, containing one hundred and five barrels each, which arrived in good condition.'

"Question: 'No claim was made against you or anybody else as to that?'

"Answer: 'No, sir.'

"Question: 'But as to the barrels that were in there on August first and were shipped out after that date, or were put in after that date and subsequently shipped out, what is the fact as to whether or not claims have been made against you on account of the fermented condition—bad condition?'

"Mr. Boothe: 'I object to that, Your Honor. Those goods were shipped a long ways in refrigerator cars, probably three or four weeks reaching their destination.'

"The Court: 'I think it is a circumstance; whatever the jury thinks it is worth, of course.'

"Answer: 'Why, most of them arrived in bad condition, excepting these I have just mentioned, the two cars.'

"To all of which testimony the defendants by their attorney objected, and excepted to the rulings of the Court in permitting the same to be given, and an exception was allowed.

In connection with consideration of assignments of error (2), (3) and (4), the following is quoted from the bill of exceptions:

"At the conclusion of the testimony the defendants, by their attorney, requested the Court to instruct the jury to bring in a verdict in favor of the defendants for the following reasons: The testimony in this cause shows that many of the barrels of loganberries were in a fermenting and damaged condition at the time they were placed in the cold storage plant of the defendants. That the burden of proof is always on the plaintiff to show negligence on the part of the defendants which caused damage to the goods, if any. That the defendants, having overcome by their evidence any presumption of negligence on their part and having produced testimony to the effect that the said 398 barrels of loganberries were in a damaged condition when placed in the cold storage plant of the defendants, it became necessary for the plaintiff to then go forward with the evidence and still maintain the burden of proof in order to charge the defendants with negligence. That if the said loganberries were delivered to the defendants in a damaged condition and were still further damaged by the acts of the defendants, it was the duty of the plaintiff to show the value of the goods when placed in cold storage and the value of the goods after they were further damaged by the acts of the defendants. That no such proof having been offered by the plaintiff, the defendants were entitled to a directed verdict in their favor, which the Court refused. To the refusal of the Court in so directing the jury, the defendants by their counsel duly excepted and an exception was allowed."

ARGUMENT

Reversible error was committed in the admission of evidence.

1. The rule is well settled in this Court, and in the Federal Courts generally that, in a trial before a jury it is reversible error to admit evidence which should have been excluded, unless it affirmatively appears, beyond doubt, that the error was without prejudice to the rights of the party against whom it was committed.

The rule was stated by this Court, with ample citation of authority, in U. S. vs. Honolulu Plantation Co., 122 Fed. 581, 583. This was an action brought by the United States to condemn certain land on Pearl Harbor, Hawaii. The defendant was permitted, over the objections of the plaintiff, to give evidence as to the maximum capacity of its pumping plant and the size of its sugarmill upon other properties, and the expenditures in connection therewith. The pumping plant and the sugar mill were not located upon the tract sought to be condemned, but it was contended that the evidence had some relevancy because it tended to show that the defendant was equipped to operate the tract which the United States was seeking to condemn. This Court held that these matters had no proper connection with the value of the lands the government sought to take, but that they might have the effect of enhancing the value of the land in the minds of the jury. In reversing the judgment entered upon the verdict this Court said:

> "Material evidence erroneously admitted in a trial before a jury is always reversible error, unless

it can be properly said that such admission was, without doubt, without injury."

In Mexia vs. Oliver, 148 U. S. 664, 673 (37 L. Ed. 602, 606), the Supreme Court reversed the judgment of the lower Court for the reason that evidence had been erroneously admitted, and say:

"We cannot say that these errors were immaterial, as it does not appear, beyond doubt, that they were errors which could not prejudice the rights of the plaintiff."

In Gilmer vs. Higley, 110 U. S. 47 (28 L. Ed. 62, 63), the Court, in referring to the rule, said:

"The farthest any Court has gone has been to hold, that when such Court can say affirmatively that the error worked no injury to the party appealing, it will be disregarded. This Court in Deery vs. Cray, 5 Wall. 807, 72 U. S. 657, used this language: 'Wherever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.' "

Additional authorities to the same effect are collected under Point I of Points and Authorities.

2. The same result is reached and the same rule applied, even though the evidence be immaterial. The Supreme Court of the United States, in Lucas vs. Brooks, 85 U. S. 436 (21 L. Ed. 779, 783), recognized and applied this rule, and observed:

"A judge well performs his duty when he guards the jury against having their attention diverted from the real issue by the introduction of immaterial evidence."

The Circuit Court of Appeals of the Eighth Circuit, in Golden Reward Mining Co. vs. Buxton Mining Co., 97 Fed. 416, discussing the rule, among other things, said:

"As a general rule any evidence is admissible which has a reasonable tendency to establish a material fact in controversy, provided the evidence is not of a hearsay character or otherwise incompetent. Ins. Co. vs. Weide, 11 Wall. 438, 440. If testimony is relevant to an issue it is generally admissible and the courts will not ordinarily consider its weight but will leave that question to be determined by the jury. This rule, however, is subject to the important qualification that testimony which does not have some tendency to establish a material fact may be rejected by a trial judge, and it should be rejected, when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case, and protract the trial beyond reasonable limits. This limitation of the general rule, requiring all relevant testimony to be admitted, to which we have last alluded, is not only reasonable in itself, but it is well supported by the authorities."

For additional authorities see Point II of Points and Authorities.

3. The evidence objected to is set out on earlier pages of this brief in connection with the Assignments of Error. (See also Trans. pp.——.) Before discussing whether, in the light of the authorities, this evidence was admissible, the evidence itself, its prejudicial nature, and its setting in the record will be briefly examined and discussed.

Mr. Baker was the plaintiff in the court below and is the defendant in error here. He recovered the judgment which is sought to be reversed on the writ of error to this Court. The evidence deemed inadmissible and prejudicial was given by him upon his direct examination. Preliminarily it will be observed that this action was tried on an amended complaint, answer thereto and reply. The amended complaint appears at pages —— of the transcript. In this amended complaint the defendant in error, Mr. Baker, alleged that he had stored with the plaintiffs in error, in their warehouse in Portland, Oregon, in the months of July and August, 1920, a specified quantity of loganberries, to-wit, 398 barrels, containing 170-156 pounds; that through the negligence of the plaintiffs in error these berries had deteriorated and become worthless and that he was damaged to the full extent of the market value of the berries in August, 1920. There is no allegation or suggestion in the amended complaint that any berries other than the 398 barrels had been delivered by Baker to the plaintiffs in error in July and August, 1920, or at any other time, and there was no issue made by the pleadings or involved, either directly or indirectly, in the case, as to the delivery by Baker to the plaintiffs in error of any

other berries at any time, or as to any damage to other berries delivered to the plaintiffs in error by him, or claims made against him by parties to whom he had shipped other berries that had been stored by him with the plaintiffs in error.

The evidence of Mr. Baker clearly locates him on the Pacific Coast during the months of July and August, 1920. He testified that on July 15, 1920, he wrote a letter from Tacoma, Washington, to the plaintiffs in error (Trans., p. —) and on July 31, according to his own testimony he was in Portland (Trans. p. —). On August 14 he was at Bellingham, Washington (Trans, p. —); on August 16 he telegraphed from Bellingham, Washington, to the plaintiffs in error. On August 20 he was in Portland (Trans. p. —). On the 29th or 30th of August he was again in Portland (Trans. p. —).

The barrels of loganberries which are involved in this case were in Portland during all of this time. They were delivered to the warehouse of the plaintiffs in error, according to the allegations of the amended complaint, during the months of July and August, 1920. Thereafter they continued to remain in the warehouse. Over the objection and exception of counsel for the plaintiffs in error, Mr. Baker, defendant in error, was permitted to testify that between the first of August, and, say, about the sixteenth of the same month, he shipped three cars of berries from the warehouse of the plaintiffs in error in Portland; that one car shipped to Chicago, to one of his buyers, about the fourth of August, arrived there with about 29 barrels in bad order, according to

the reports he received; that another car, which he claims to have shipped four or five days later, arrived there with between fifty and sixty per cent in bad order, and a third car, which went out still a few days later, arrived all in bad condition; and that all that were shipped after that arrived in bad order. He was also permitted to testify that as to two cars shipped to St. Louis prior to August first, 1920, and which he says arrived in good condition, no claim had been made against him, presumably by the buyers. The plain inference from this last statement was that claims had been made against him on account of the alleged bad condition of the berries which he shipped to Chicago and other places after August first. (Trans. p. —.)

We have here, then, admitted for the consideration of the jury, evidence of the defendant in error himself of the alleged bad condition of berries, other than those involved in this action, upon or after their arrivel in Chicago and other eastern points. These berries were shipped from Portland in August, that is during the warm summer weather. They were transported a distance of two thousand miles or more by railroad. The witness who gave the testimony, that is the defendant in error, was on the Pacific Coast during the time these shipments were made, a fact which appeared in the record when the evidence objected to was admitted, because he had previously given testimony open to no other construction, as already pointed out. The questions were directed to the condition of the berries upon their arrival in Chicago and other eastern points during a period of time when the witness was out on the Pacific

Coast. This testimony laid before the jury the claim of the defendant in error that he had sustained losses vastly in excess of what he was suing for and clearly suggested to the jury that sundry claims had been made against him by persons and concerns who had purchased berries from him because of the alleged bad condition in which they arrived. If the evidence was inadmissible, it cannot be said, beyond a doubt, that it was not prejudicial. It was evidence of a character that manifestly would divert the minds of the jury from the case before them, confuse the issues, and tend to excite prejudice against the plaintiffs in error.

Now, the theory upon which counsel for defendant in error pressed upon the Court the admissibility of the evidence, and adopted by the trial court, was that the berries which had been shipped to Chicago and other eastern points in the summer of 1920 had been placed in the warehouse of the plaintiffs in error in July and August, 1920, that is during the same months as the berries involved in this case; that the defendant in error, although on the Pacific Coast at the time the shipments were made, might properly testify as to the condition of the shipments when, or some time after, they arrived at Chicago or other eastern points of destination from reports which he received in regard to such matters; and that the condition of the berries shipped from Portland in August, 1920, two thousand miles by rail in the warm summer weather when, or some time after, they arrived at Chicago, or other eastern points, would have a logical tendency to prove that the 398 barrels involved in this case, and which had remained in the warehouse of the

plaintiffs in error at all times after they had been placed there in July and August of 1920, had been damaged through the negligence of the plaintiffs in error. We think the mere statement of the theory makes clear its unsoundness.

> "For the purpose of establishing a particular condition of things it is not permissible, according to fundamental principles, to show a condition at other places than the one in question—at any rate if such places are so remote that difference may exist between them and the place in question."
>
> 10 R. C. L. 944.

> "Evidence that a fact did or did not exist or occur at a particular time, is not admissible to show that another fact or event did or did not exist, or occur, at another time, unless the two facts or occurrences are connected in some special way, indicating the relevancy beyond mere similarity in certain particulars."
>
> 22 Corp. Jur. 750.

> "Evidence of similar occurrences is admitted where it appears that all the essential physical conditions on two occasions were identical, for under such circumstances the observed uniformity of nature raises an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to a matter which cannot reasonably be expected to have affected the result. On like principles, other occurrences have

> been deemed relevant where the essential conditions are similar, although the law of uniformity in action underlying the relevancy is not natural but legal. The burden rests upon the party offering the evidence to satisfy the court that the necessary similarity of conditions exists and in the absence of such a showing the evidence will be rejected."
>
> 22 Corp. Jur. 751-752.

These principles are fundamental. They have been applied many times by the Courts.

There was an essential dissimilarity in the conditions surrounding the handling and shipment of the berries that went to Chicago and other eastern points, and the conditions surrounding the 398 barrels involved in this case. In the case of the latter they remained in the warehouse. One of the issues involved in the pleadings and evidence was whether or not these particular 398 barrels were or were not in a damaged condition when they were placed in the warehouse. The objectionable evidence was directed to proof of the condition of the berries shipped to Chicago and other eastern points at the time, or some time after, they arrived at destination, after the expiration of perhaps one, two or three weeks and after being transported two thousand miles or more in hot weather. This evidence must have been offered for the purpose of permitting the jury to draw an inference therefrom that, because the berries shipped east were found to be in a bad conditions after they had arrived at eastern points, and some time after they had left the warehouse of the plaintiffs in error, this condition

must have been due to the negligence of the plaintiffs in error, and from this inference draw a further inference that the alleged damaged condition of the berries involved in this case was also due to the negligence of the plaintiffs in error; thus piling inference upon inference as a basis for a conclusion or verdict.

The rule we invoke has been applied in a variety of cases. In the case of Campbell vs. Russell, 139 Mass. 278, 1 N. E. 345, the defense was that the work on a contract for the construction of a house was done in an unskillful and unworkmanlike manner. The defendant offered to show that in a house similar to the one in controversy, planned by the same architect, and in which some of the timbers and spans were the same and some different, the timbers had not sagged and the floors had not settled. In holding this evidence inadmissible the Court said:

> "The controversy between the parties related to the house built by the plaintiff and not to another house. What happened to another house would not aid the jury unless it was shown that the two houses were identical and subject to the same forces and conditions."

In the case of Albany & Renssellaer etc. Co. vs. Lundberg, 121 U. S. 451 (30 L. Ed 982, 985), the rule was applied, resulting in the reversal of the judgment of the Court below. It was an action for damages for the refusal of the defendant to accept Swedish pig iron tendered under a contract. The defense was that the pig iron tendered contained a greater percentage of

phosphorus than that contracted for. Evidence was admitted, over objection, tending to prove the percentage of phosphorus contained in other pig iron from the same concern and made in the same furnace in previous years, without showing identical quality and conditions. The Supreme Court of the United States held that this evidence was irrelevant and incompetent and that it manifestly tended to prejudice the rights of the defendant with the jury.

Rehberg vs. City of New York, 99 N. Y. 632, 2 N. E. 11, was an action for damages alleged to have occurred through the falling of a pile of brick. Evidence was offered upon the trial for the purpose of comparing and contrasting the pile of brick in question with other somewhat similar piles of brick. This evidence was held to be inadmissible for a number of reasons, among others, that the proof failed to disclose that the other piles were in every essential respect identical with the one involved in the case. Speaking of the evidence offered the Court said:

> "It would tend to divert the attention of the jury from the real issue as to the negligence of the city in allowing the construction and maintenance of the pile in question."

Washington Township Farmers etc. Co. vs. McCormick, 19 Ind. App. 663, 49 N. E. 1085 was an action between a gas company and a consumer, and the issue was whether or not the gas company had furnished sufficient gas during a certain period to properly heat and light the residence of the consumer. The consumer was

permitted by the trial court to call a number of his neighbors, who lived on farms in the same neighborhood, to testify that during the period involved in the case the gas company had not furnished them with a sufficient quantity of gas for heat and light. It was not shown that all of the conditions and physical facts in respect of supplying of gas to the neighbors were identical with those existing in relation to the consumer who was one of the litigants. This was held to be error for which the judgment was reversed. The opinion contains an illuminating discussion of the rule, with citation of a number of cases.

Other cases in which the rule was applied are cited under Point III of Points and Authorities.

It is respectfully submitted that the judgment should be reversed and the case remanded for a new trial.

J. F. Boothe,
Attorney for Plaintiffs in Error.

Clark, Middleton, Clark & Skulason,
of Counsel.

No. 3965

In the

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM REID and WILBUR P. REID, Partners doing business under the firm name and style of National Cold Storage & Ice Company

Plaintiffs in Error

vs.

H. A. BAKER

Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

Brief of Defendant in Error

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Attorney for Plaintiffs in Error

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Brief of Defendant in Error

STATEMENT OF THE CASE.

This was an action by Baker against the Reids doing business as National Cold Storage and Ice Company, who will be referred to as the Cold Storage Company, for the loss of 398 barrels of loganberries weighing 170,156 pounds.

During the months of July and August, 1920, Baker purchased from growers and packed at

Salem, Oregon, approximately 1,600 barrels of loganberries. (Record, p. 404.) The packing of berries consists in placing them in fifty-gallon barrels and then sealing on tops. The barrels in question were conveyed by covered trucks from Salem, Oregon, to Portland, Oregon, a distance of approximately fifty miles, where they were delivered to the Cold Storage Company for freezing and safe keeping. It was the practice to deliver the barrels to the Cold Storage Company at Portland on the next day after the berries were picked from the fields.

The complaint recited the storage of 398 barrels of loganberries with the Cold Storage Company during the months of July and August, 1920; that the loganberries when delivered were in good condition, that they were delivered and accepted by the Cold Storage Company to be kept in a proper state of refrigeration so that they would not ferment or deteriorate in value, but that the Cold Storage Company permitted the temperature in the rooms where the berries were stored to go above freezing—32 degrees—resulting in fermentation of the berries and their loss, and judgment at the rate of 17½ cents per pound, or a total of $29,777.30, was prayed.

The Cold Storage Company by its answer admitted the receipt of the berries and their weight but asserted that the berries were in bad condition when delivered to it, notwithstanding which the

barrels were accepted and kept and at the time of the trial were in as good condition as when delivered except for natural decay. The answer also asserted that during the years 1920 and 1921, Baker stored with the Cold Storage Company "various and sundry barrels of loganberries including the 398 barrels mentioned in the complaint herein for which storage the plaintiff promised to pay the defendants at the rate of $1.15 per barrel for the first month and 65 cents per barrel per month thereafter", (Record, p. 12), and a total claim of $5,811.34 was set up against Baker.

The trial resulted in a verdict and judgment for Baker for $23,000.

The testimony as to the condition of the berries when picked covered all of the barrels because there was no way to identify the 398 barrels from the others; likewise all of the barrels were picked at Salem and were hauled to Portland and delivered to the Cold Storage Company under identical conditions. Delivery to the Cold Storage Company extended through the months of July and August. As the season advanced Baker from time to time gave orders to the Cold Storage Company to load a given number of barrels on refrigerator cars, and these would be shipped East. Shipments began about the last of July.

In the early part of August, Baker discovered that the temperature in the cold storage room in-

stead of remaining around 20 to 24 degrees had been permitted to go above freezing, resulting in the bulging and bursting of barrel heads. A considerable number of barrels had been shipped before this was discovered. Shipments were stopped and after the barrels were cleaned up, further shipments were made, Baker not appreciating the extent of the loss. The barrels thus shipped had been sold to eastern purchasers f. o. b. cold storage plant, Portland, Oregon, and it was to protect prior sales that many of these were made. It finally became evident to Baker that the rise in temperature in the cold storage plant had been for a much longer period than he had supposed and he became convinced that all the berries which were subjected to this rise in temperature, had fermented and were worthless. By this time there were only 398 barrels left in the Cold Storage Company plant and this action was brought to recover for the loss of these berries which remained.

In the course of the trial and in order to show what had happened as to the temperature, and the effect on the berries in question due to a rise in temperature, as well as efforts to dispose of these barrels, Baker was asked as to some of the barrels that went East. The answers objected to were as follows:

> "The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in

bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about between fifty and sixty per cent; I understand there was about one hundred barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty to sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad condition and all that were shipped arrived after that—between that time and when I stopped them, when I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation." (Record, p. 169.)

"Why, most of them arrived in bad condition excepting those I have just mentioned, the two cars." (Record, p. 171.)

Of the assignments of error the only one pressed before the court has to do with these answers.

ARGUMENT.

The cases found in the brief of plaintiffs in error are statements of general law concerning which there can be little dispute. We think it will be conceded that an appellate court will not presume error or prejudice; on the contrary we understand the rule to be that to justify reversal testimony objected to as immaterial or irrelevant must be shown to be such and if it is immaterial or irrelevant it must

appear from the case that prejudice has resulted. As said by the court in *Miller vs. Continental Shipbuilding Corporation,* 265 Fed. 158 (C. C. A. 2d):

> "To justify a reversal because of the admission of immaterial evidence, it should appear that the error was so substantial as to injuriously affect the rights of the plaintiff in error as prejudice will not be presumed."

Furthermore, the general language of the court in *Lancaster vs. Collins,* 115 U. S. 222, at 227, is:

> "No judgment should be reversed in a court of error when it is clear that error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was made."

I.

The Evidence Objected to was Relevant and Material.

(a) The amended complaint alleged and the answer denied "that the temperature in the room or rooms where said loganberries were stored was permitted by defendants to go above freezing point" (Record, pp. 6, 10), and it was also asserted and denied that the loganberries were not kept in the proper state of refrigeration. It was incumbent upon Baker to prove that the temperature did go to freezing or above and for how long it remained there. Baker was in the cold storage plant on July 31 and all of the barrels seemed to be in good condition. (Record, p. 162.) He began to ship out

about this time. (Record, p. 163.) About August 16 he learned that the temperature of the room had gone up to 36. (Record, p. 165). At this stage of the case, when the testimony objected to was given, Baker was trying to show about when the rise in temperature began and how long it lasted. Therefore, he explained (Record, p. 170), that prior to August 1, two cars were shipped without any difficulty. As to the cars which were in the cold storage plant on August 1 and were shipped on or after that date, most of them arrived in bad condition. (Record, p. 171.) Clearly this evidence threw some light on the question of what was going on in the cold storage plant and as later developed from the testimony of the chief engineer of the Cold Storage Company, the temperature did start up on August 1 (Record, p. 452), and continued up until August 21 (Record, p. 455). At the outset, however, Baker was confronted with a denial that the temperature had gone up to or above freezing and there was no indication that the Cold Storage Company had or would produce such a record as it did offer at the conclusion of the trial. The testimony objected to showed that two cars—about 200 barrels—shipped out before August 1 went East without trouble and that barrels shipped out after August 1 were for the most part in bad condition. These circumstances tended to show the temperature began to rise August 1.

(b) The evidence objected to was material as showing the effect of a rise of temperature on the berries. It must be remembered that except for the two hundred barrels which were shipped out before August 1, all of the barrels including the 398 barrels here involved, were picked in the fields, packed in the barrels, transported to the cold storage plant, and subjected to the same rise in temperature which began on August 1. It was claimed by the Cold Storage Company that the rise in temperature did not cause fermentation, and furthermore, that fermentation would not injure the loganberries. It is manifest that the condition of other barrels, as to fermentation, handled in precisely the same manner as the 398 barrels, would have some value in showing the condition of the 398 barrels. The testimony therefore showed that as to the two carloads which went East prior to August 1, they arrived in good condition, but

> "The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about fifty and sixty per cent; I understand there was about one hundred barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty or sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad con-

> dition and those that were shipped arrived after that—between that time and when I stopped them, when I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation." (Record, p. 169.)

(c) Throughout the case it was claimed by the Cold Storage Company that Baker had failed to make efforts to dispose of the 398 barrels and that he was in duty bound to take possession of these barrels and dispose of them. Baker claimed to have taken every reasonable step that was possible to dispose of the 398 barrels. The testimony objected to was directly in point showing efforts to dispose of a large number of other barrels which had been handled in the same manner as the 398 barrels. It was shown that Baker had already sold on future contracts a large quantity of these barrels and shipments from this lot to apply on those contracts met with failure and a shipment by Baker of 100 barrels to himself at Chicago arrived in bad order and could not be sold. (Record, pp. 194, 212, 213.)

As explained by Baker (Record, p. 183):

> "We could not, very well, Mr. Boothe, because they had been thoroughly fermented out at that time. You don't know what shape they were in. As I told you before in my testimony, we shipped out in August car after car and they arrived back in Chicago in bad order, we could not go any faster than we did and had to stop."

(d) The testimony was material on the question of storage charges. The Cold Storage Company by its answer asserted a claim of $5,811.34 as storage charges covering the storing and handling of "various and sundry barrels of loganberries including the 398 barrels mentioned in the complaint herein." If the Cold Storage Company failed to perform its duty in handling all or any part of these berries for which the storage charges were claimed, then it was not entitled to recover such charges, at least charges after August 1. Testimony therefore showing the bad condition of barrels shipped on or after August 1 was important in determining whether any charges had been earned after that date.

Complaint is made in the brief of plaintiffs in error that the testimony objected to was incompetent because Baker was on the Pacific Coast when the various shipments arrived in the East. At the outset it should be noted that no objection was made to the testimony on the ground that it was incompetent or that Baker did not have personal knowledge of the matters concerning which he spoke. Furthermore, there was no attempt to cross examine Baker and develop any lack of knowledge if that was true. It only required three days to go to and from Chicago and he was doubtless there some of the time. It is obvious that Baker was the most likely man to be familiar with his own business and unless some objection as to his competency

was made or some proof to the contrary were offered, the testimony should stand.

The objection, in the record, to this testimony, seems to be predicated upon the theory that it is too remote because, to quote the language of counsel for plaintiffs in error, "those goods were shipped a long ways in refrigerator cars." (Record, p. 170.) It was shown, however, that the shipment of barreled loganberries by refrigerator cars to eastern points, is a common method of doing business. Baker had shipped thousands of barrels in his experience. (Record, p. 171.) He said: "I have never lost a barrel in shipping by refrigeration. We have had some loss but not loganberries, where there was lack of ice, but those are very exceptional." Furthermore, it was brought out by counsel for the Cold Storage Company in the cross examination of Baker that certain actions had been instituted by some of the purchasers of these berries against railroad companies, but after investigation they had found that the railroad companies were not at fault and the claim "was either against the Cold Storage Company or myself." (Record, p. 215.) This was testimony offered by counsel for the Cold Storage Company. It is submitted, therefore, that the position of the District Judge as to this evidence was correct when he said, "I think it is a circumstance, whatever the jury think it is worth, of course."

But it is said that evidence of other barrels of the same lot arriving in bad condition, was prejudicial to the Cold Storage Company and would inflame the mind of the jury. It will be observed from the record that counsel for Baker said, "We are not claiming any damages for those that went East" (Record, p. 169), and this was thoroughly understood by the court, jury and counsel for the other side. Furthermore, it was clearly shown that a large part of the barrels that were shipped East had been sold f. o. b. cold storage plant, Portland, Oregon (Record, pp. 179, 207), and the loss did not fall on Baker. Furthermore, the total claim for the 398 barrels at the rate of 17½ cents per pound was $29,777.30. There was ample testimony showing the market value of 17½ cents as a measure of loss. The jury allowed $23,000. There is not the slightest indication of any passion, or prejudice, or inflamed state of mind on the part of the jury, or that it undertook to allow damages for some other barrels.

It should be noted that the counsel for the Cold Storage Company repeatedly brought before the attention of the jury the same line of testimony as here objected to. In the cross examination of Baker (Record, p. 193), counsel asked:

> "What did you want to sell them for? A. I was going to sell them for what they were worth. We didn't sell them, we sent them back to Chicago. Those are not sold. We sent them

> back to Chicago to see what we could do with them. We soon found out we could not do anything with them."

Furthermore, in the cross examination of Baker counsel for the Cold Storage Company had him identify defendants' exhibit "F" (Record, p. 208), which was offered and introduced. That exhibit in part states:

> "It is rather unfortunate that you shipped any loganberries at a time when the temperature was running from 33 to 36; that is what is now causing trouble in the East as indicated by the car shipped to Durant and Casper."

It should also be pointed out that the depositions of Matthew H. Theis and Peter J. Slaughter were taken on behalf of Baker prior to the trial and read in evidence. The testimony of Theis (Record, pp. 248, 254), refers to the condition of barrels shipped to Chicago concerning which no objection was made. Furthermore, counsel for the Cold Storage Company cross examined this witness without objecting to his direct testimony and brought out on such cross examination the very facts upon which error has been predicated. (Record, p. 266). The same may be said of the testimony of Peter J. Slaughter (Record, pp. 276, 282), and his cross examination by counsel for Cold Storage Company (Record, p. 286.) See generally on the relevancy and materiality of such evidence and the discretion of the trial court, I Wigmore on Evidence, Sections 441-444.

II.

The Admission of the Testimony Complained of Was Not Prejudicial Error.

It is difficult to see where prejudicial error could have resulted to the Cold Storage Company. In fact, the objection was faintly made at the time (Record, pp. 168, 170). No ground for the objection was assigned except that the barrels had nothing to do with the barrels in question and that they were shipped a long ways in refrigerator cars. That they did have to do with the barrels in question is shown by the fact they were picked, handled, stored and subjected to the same temperature as the barrels in question, the former having moved out in refrigerator cars and the latter remaining where they were, but the handling of loganberries in refrigerator cars was shown to be as safe and common as to leave them in a cold storage plant. The evidence did, therefore, have something to do with the question of what had happened to the 398 barrels and their condition. It is significant that counsel for the Cold Storage Company after faintly objecting to this evidence, cross examined at considerable length on the question of barrels that had gone East. Furthermore, as indicated above, no objection was made to the testimony given by witnesses Theis and Slaughter as to some of these barrels and their condition, and it is apparent that counsel ought not to claim error where the record

shows that most of the interrogating as to the shipped barrels was on the part of counsel himself.

At the end of the case the court instructed the jury as to the 398 barrels, so that there could be no mistake as to what was the subject under investigation (Record, p. 492). There was no request by counsel for the Cold Storage Company that any instruction be given to clear the minds of the jury, or that it had been misled, and there were no exceptions to the instructions as given by the court.

Furthermore, if by any possibility it could be said that the evidence in question was error which had not been waived, then it seems clear that the case was proved without this evidence and therefore the admission of the evidence was harmless.

This court announced the rule in *Sharples Separator Company vs. Skinner,* 251 Fed. 25 (C. C. A. 9th), quoting from the head note, as follows:

> "The admission of testimony is harmless, if erroneous, where the fact elicited was established by other competent evidence."

The same rule was stated in *Keith Lumber Company vs. Houston Oil Company,* 257 Fed. 1 (C. C. A. 5th), reading from the head note, as follows:

> "The erroneous introduction in evidence of a decree was harmless, where there was ample evidence outside of the record to show the fact of title for which the decree was used."

See also to the same point, *South Memphis Land Company vs. McLane Hardwood Lumber Company,* 210 Fed. 257 (C. C. A. 6th).

In this case the fact that the temperature was permitted to go to and above freezing which was denied in the answer was later proven by the witnesses for the Cold Storage Company. Furthermore, the length of time during which the temperature remained at freezing or above was shown. It was demonstrated by other testimony that to remove the temperature from the 398 barrels was to destroy their food value and their value at 17½ cents per pound was established. It was proved that the Cold Storage Company took its freezer machine from the cold storage room to make ice on another contract. All of this testimony developed as the case progressed and the right of Baker to be compensated for the 398 barrels on account of the fault of the Cold Storage Company, was demonstrated to the satisfaction of the jury. The case was fairly tried as will be seen from an examination of the entire record which has been brought up, and is particularly evidenced by the fact that there were few objections and there is but one assignment of error argued here.

The argument of counsel for Cold Storage Company when fairly analyzed amounts to an objection that the jury should have awarded a different verdict, whereas a reading of the record will furnish

proof that the verdict was justified under every consideration; at any rate, fact issues were presented to the jury and fairly decided. Under these circumstances the language of Mr. Justice Shiras in *Holmes vs. Goldsmith,* 147 U. S. 150, 13 S. C. R. 288 at 292, is applicable. He said:

> "The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

It is submitted that the testimony complained of was relevant, but if not, it in no way constituted prejudicial error justifying the reversal of this case.

Respectfully submitted,

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OMAR C. SPENCER,

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM REID and WILBUR P. REID, Partners doing business under the firm name and style of NATIONAL COLD STORAGE & ICE COMPANY,
Plaintiffs in Error,

v.

H. A. BAKER,
Defendant in Error.

Reply Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court for the District of Oregon.

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F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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Counsel for defendant in error, in their brief, and again on the oral argument, seem to contend that, admitting the trial Court erred in the admission of evidence the plaintiffs in error later failed to object to the introduction of other evidence of the same general character and thereby waived the errors complained of. The argument of counsel for defendant in error in its various phases as presented in their brief, and stressed upon the oral presentation of this case, are so completely answered in the opinion in the case of *Salt Lake City v. Smith,* 104 Fed. 457, 470, an opinion of the Circuit Court of Appeals of the Eighth Circuit written by Judge Sanborn, that we content ourselves with the following quotation therefrom:

> "Another contention is that counsel for the city waived their objection, because, after it was offered, and after they had taken their exception,

they permitted the testimony of other witnesses to be read without objection, and because in the proof of their defense they availed themselves of the same class of testimony. But the single objection which they made, and the single exception which they took, presented the entire question of the introduction of this hearsay testimony, and elicited a ruling of the court upon it which was conclusive and controlling at that trial of this case. There was no reason or call for further objections to evidence of this character, and their only effect would have been to annoy the court and to delay the trial. When a question has once been fairly presented to the trial court, argued, and decided, and an exception to the ruling has been recorded, it is neither desirable nor seemly for counsel to continually repeat their objections to the same class of testimony, and their exceptions to the same ruling which the court has advisedly made as a guide for the conduct of the trial. Counsel for the city lost nothing by their failure to annoy the court by repeating an objection which it had carefully considered and overruled. Nor did they waive this objection and exception by introducing in defense of the suit evidence of the same character as that to which they had objected, and which they had insisted was incompetent. They had presented their view of this question. They had objected to hearsay testimony, and had excepted to the ruling which admitted it. They had not invited the error of that ruling, but had

protested against it. This was all that they could do. The plaintiffs had induced the court to commit the error, and were thereby prohibited from availing themselves of it in any court of review. Under this error they established their case by hearsay. Were counsel for the city required to refrain from meeting this proof by evidence of like character, under a penalty of a loss of their objection and exception? By no means. They had presented to the court and argued what they deemed to be the law. The court had held that they were mistaken. However firm they were in their conviction of the soundness of their position, the presumption was that they were in error; and it was the part of prudence and their duty to their client and the court to produce all the evidence which they could furnish in support of their demands, under the rule which the court announced, firmly but respectfully preserving their right to reverse the judgment if they failed to win their suit under the erroneous rule which the court had established. If they succeeded and obtained a verdict, the plaintiffs could not complain of the error which they had themselves invited, and the defendant's case would be won. If they failed, they would in this way preserve, as they had a right to do, the right of their client to the trial of its case according to the statute and the established rules of evidence, of which the erroneous ruling had deprived them. One who objects and excepts to an erroneous ruling which

permits his opponent to present improper evidence does not waive or lose his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case. *Russ v. Railway Co.,* 112 Mo. 45, 50, 20 S. W. 472, 18 L. R. A. 823; *Gardner v. Railway Co.,* 135 Mo. 90, 98, 36 S. W. 214."

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